SUPREME COURT, U. S.
FILED
FEB 19 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1275

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner,

vs.

TRANSCONTINENTAL GAS PIPE GAS LINE CORPORATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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February 19, 1974.

Gunthorp-Warren Printing Company, Chicago • 346-1717

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vs.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case.

OPINIONS BELOW

The initial opinion and order of the Court of Appeals and its opinion and order granting clarification and denying remaining motions are not yet reported, but are set forth as Appendices A and B, respectively, of this Petition. The initial opinion (No. 655) of the Federal Power Commission and its Opinion Denying Rehearing and Partial Stay are set forth as Appendices C and D, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on November 12, 1973. A petition for rehearing filed by Petitioner was denied on November 21, 1973. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U. S. C. 717r(b).

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that "primary importance" must be given to the comparative needs of two pipelines, where substantial evidence showed the comparative need to be approximately equal, and thereby improperly substituted its judgment for the judgment of the agency that other factors, *e.g.*, long-standing contracts, agency-approved settlement, equitable considerations, were dispositive in a proceeding involving the abandonment of natural gas sales to one pipeline and certification of the sale of that natural gas to another pipeline.

STATUTE INVOLVED

Section 7(b) of the Natural Gas Act (Act), 52 Stat. 824, 15 U. S. C. 717f(b), reads as follows:

> No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

Relevant here is that part of Section 7(b) providing for abandonment where permitted by the "present or future public convenience or necessity."

STATEMENT

In 1952, both Transcontinental Gas Pipe Line Corporation (Transco) and Texas Illinois Natural Gas Pipeline Company, predecessor to Natural Gas Pipeline Company of America (Natural or Petitioner) were purchasing gas from the La Gloria Field, Jim Wells and Brooks Counties, Texas. During 1953, producers in that field began to reduce deliveries to Natural after a dispute over contract rights and sought to terminate their contracts with Natural. Natural filed complaints with the Federal Power Commission (Commission) against these producers, seeking restoration of deliveries, and the Commission issued show cause orders against the producers. These proceedings were consolidated in *Argo Oil Company, et al.*, Docket Nos. G-2950, *et al.* Transco, recognizing the possible prejudice to its status as a purchaser in the La Gloria Field, intervened.

The Commission held that the producers, in order to terminate deliveries to Natural, must seek abandonment under Section 7(b) of the Act (15 FPC 622). While an appeal of this decision was pending, the parties to the *Argo* proceeding agreed to a settlement of all issues. No party, including Transco, objected to the settlement. Approval by the Commission of this settlement terminated the proceeding [20 FPC 208 (1958)].[1]

In the *Argo* settlement, Natural agreed to accept reduced deliveries from the La Gloria Field until April 1, 1971, when Transco's contract to purchase 81,000 Mcf per day in the La Gloria Field expired. In exchange, the producers dedicated to Natural all reserves in the La Gloria Field subject only to existing contracts, including Transco's. Essentially, Natural was to accept reduced deliveries for the term of other existing purchase contracts in order to obtain larger volumes of gas later.

1. Commission action in *Argo* is found at 14 FPC 597, 598, 624 (1955); 15 FPC 601, 622, 1221 (1956); and 20 FPC 208 (1958).

On January 18, 1971, Mobil, operator of the La Gloria Field, petitioned the Commission for abandonment of sales to Transco and certification of sales to Natural, effective April 1, 1971, when Transco's contract expired. Other producers followed suit. The abandonment proceedings were consolidated in *Hilda B. Weinert and Jane W. Blumberg, et al.*, Docket Nos. G-2730, *et al.* (J. A. 45-54). Transco, Natural and certain of their customers were allowed to intervene.

Hearings were conducted from October 8, 1971 through October 19, 1971 (R. 1-1277), after which, on June 2, 1972, the Examiner rendered an Initial Decision denying abandonment (J. A. 55-105). The initial decision relied on the "comparative need" test of *Michigan Consolidated Gas Co.* v. *F. P. C.*, 283 F. 2d 204 (D. C. Cir.); *cert. den.*, 364 U. S. 913 (1960) (J. A. 85) in holding that Natural had not shown a greater need and that the possible effect on Transco's customers of abandonment was "more substantial" than the effect of denial of abandonment on Natural's customers. The Examiner did not quantify his conclusion, however, and it is clear from the elements found favorable to Natural that the Examiner found the relative needs were quite evenly balanced. The Commission's Staff urged before the Examiner (and later the Commission) that Natural had shown the greater need for the gas.

The Commission, in Opinion No. 655 issued March 21, 1973, reversed the Examiner's decision, thereby permitting abandonment of service to Transco and granting certification of sales to Natural (Appendix C). The Commission viewed the standard of public convenience and necessity broadly, emphasizing that the gas reserves in question would remain in interstate commerce by certification under the public convenience and necessity standards of Section 7(e). After noting the importance of the Commission-approved settlement of 1958, which assured Transco of its contract volumes of gas while contemplating that Natural's reduction in volumes would be made up by deliveries after the Transco contract had expired, the Commission held that sole

reliance on the comparative need test by the Examiner precluded "consideration of the totality of 'public convenience and necessity' which is ours to weigh." Emphasizing the importance of contracts and settlement in the particular facts of this case, the Commission stated that Transco had the opportunity to show a need for abrogation of the Natural contract and an extension past term of its own contract, and failed to do so. The Commission concluded by pointing out that, given the short supply of both pipelines, reduction in service to the ultimate consumers of whichever pipeline failed to receive the gas reserves in question would result (App. C, p. A27). Rehearing was denied (Appendix D).

Transco and others appealed to the Court of Appeals for the District of Columbia Circuit. That court on November 12, 1973 issued an opinion and order vacating the Commission's Opinion No. 655 and remanding to the Commission for further proceedings (Appendix A). Rehearing was denied November 21, 1973. It is the November 12th Opinion and Order of the Court of Appeals which is the subject of this Petition.

THE OPINION BELOW

In vacating and remanding the Commission's Opinion No. 655, the affirmative statement of guiding principle by the court below is found in its concluding section (App. A, A10-11). There the court pointed to its *Michigan Consolidated* decision (*supra*), relied upon by the Examiner and discussed and distinguished by the Commission on rehearing (App. D, A32-33), and to the holding that judicial review is sufficiently broad to order consideration of factors "ignored" by an agency which are relevant to the public interest. Continuing, the court stated that "[p]rimary importance must be given to a broadly conceived comparison of the needs of the two natural gas systems", and concluded by listing several factors to be considered on remand as part of a "balancing process."

Negatively, the court below held that the Commission found *Michigan Consolidated* (*supra*) inappropriate in this case and gave controlling weight to the settlement absent compelling public interest proof to the contrary. The Commission, the court said, "failed to perceive that the fact that all need gas does not mean that all need it equally." (App. A, p. A8).

REASONS FOR GRANTING THE WRIT

The court below has simply and plainly substituted its judgment for that of the Commission. Both court and Commission say much the same thing on specific issues. The Commission, well aware of the *Michigan Consolidated* decision (*supra*), held that the Examiner, in placing virtually exclusive reliance on the comparative need test, improperly precluded broad consideration of the public convenience and necessity; the court said its comparative need test was not restrictive, but then held that primary importance must be given to comparative need. What the court below has done is to usurp the judgment of an expert administrative agency by requiring that agency to grant primary importance to one test after the agency, based on substantial evidence, had found that test to be indecisive.

The court below was too rigid in applying its *Michigan Consolidated* criteria to a factually disparate abandonment case; the public convenience and necessity test and finding required of the Commission is too subtle, elusive and varied to be reduced to formulae of general applicability. It is largely a matter of agency discretion, which the court below failed to recognize. There is nothing in the public convenience and necessity provision of Section 7(b) of the Act requiring the Commission to give "primary importance" to any one specific factor.

This Court's decision in *F. C. C.* v. *Allentown Broadcasting Co.*, 349 U. S. 358 (1955), affords substantial guidance and was not followed by the court below. There this Court held that,

where important factors an agency must consider in a comparative hearing leave little to choose between competing claimants, the agency may turn to other considerations as decisive, which action the court found to be within the agency's "allowable area of discretion." (349 U. S. at p. 362)

A. The Decision of the Court of Appeals Conflicts with the Decisions of this Court and of Other Circuits on Relative Functions of Court and Commission.

The decision of the Court of Appeals contravenes the uniform view taken by this Court of the allocation of powers and functions between the Commission and courts under the Act. Courts, on review, examine whether conclusions of the Commission are based on substantial evidence in the record and whether the Commission has complied with the Act. They do not, however, overrule the Commission on its policy choices exercised within the parameters of its jurisdiction.

The most important and pertinent statement of this Court on the Commission's powers is found in the *Permian Basin Area Rate Cases*, 390 U. S. 747 (1968). In that decision, this Court, *inter alia*, approved the use by the Commission of area rate regulation rather than individual producer rate regulation. This Court there stated:

> More important, we have heretofore emphasized that Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of the reviewing courts. A presumption of validity therefore attaches to each exercise of the Commission's expertise, and those who would overturn the Commission's judgment undertake 'the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.' FPC v. Hope Natural Gas Company, supra, at 602. . . . (390 U. S. at 767)

Regulation with respect to allocation of gas supplies under Section 7 of the Act is one of the regulatory functions vested in the Commission; *Michigan Consolidated Gas Co.* v. *F. P. C.*, 203 F. 2d 895 (3d Cir., 1953). There, a pipeline customer challenged the pipeline's failure to allocate to it any of the increased capacity for which the pipeline had sought and received a Section 7 certificate from the Commission. The court stated that:

> The problem of the allocation of service to various customers is one which calls for judgment within the Commission's peculiar and expert competence. Judicial review of the Commission's orders with respect to this question is, we think, limited by the rule as to the review of rate orders laid down by the Supreme Court in Federal Power Comm. v. Natural Gas Pipeline Company, 1942, 315 U. S. 575, 586 . . . as follows: 'Agencies to whom this legislative power has been delegated are free within the ambit of their statutory authority to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end.' (203 F. 2d at 900)

This Court has also held that, in considering whether to certificate transportation of gas by interstate pipeline for direct industrial customers, it is within the Commission's discretion under Section 7 to weigh the effect of the transportation on the Commission's policies regarding the use of gas, even though the Commission has no power to regulate the ultimate use directly; *F. P. C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1 (1961). However, the particular weight to be given policies with respect to end use is a question for the Commission. "In different certificate applications, the factor of end use will have varying importance." *Public Service Commission of New York* v. *F. P. C.*, 463 F. 2d 824, 826 (1972).

Evaluation of the public interest is a function of the Commission and committed to its judgment, *National Coal Association* v. *F. P. C.*, 247 F. 2d 86, 89 (D. C. Cir., 1957). The task of weighing the relative importance of elements constituting the public convenience and necessity is delegated to the Commission and not the courts.

Here the court below plainly failed to follow the teachings of these cases. It did not defer to the expert judgment of the Commission, and improperly erected and imposed unreasonable requirements at odds with the discretion entrusted by Congress to the agency.

B. The Commission Properly Made the Settlement Agreement Dispositive Where the Comparative Need of the Two Pipelines Was Approximately Equal.

Comparative need is an element in this case in determining public convenience and necessity. However, nothing in the Act mandates that comparative need is to be considered to the exclusion of all other factors. Yet the Examiner (J. A. 85) and the Court of Appeals (App. A, pp. A6-10) were so entranced with the comparative need standard that all other factors were relegated to make-weight status. Reliance for this standard was placed on *Michigan Consolidated Gas Co.* v. *F. P. C.*, 283 F. 2d 204 (D. C. Cir.), *cert. den.* 364 U. S. 913 (1960). The court there approved the Commission's application of a comparative need standard in the circumstances of that case; however, the court could not bind the Commission to any rigid standard of universal applicability, as the Examiner and Court of Appeals apparently believe.

The Commission appropriately relied on factors other than comparative need to dispose of this case, since it was fully aware of the great need of both pipelines for the gas supply in question, a need that was about equal. With data available to it at the outset of the hearing and relying on its expertise, the Com-

mission was able to recognize that comparative need was not a controlling element (J. A. 49). Nevertheless, substantial evidence was received in the hearing bearing on the comparative need of the pipelines, and no proffered evidence on this point was excluded.

The Examiner's 50-page decision, while concluding that Natural had not demonstrated greater need for the gas, made numerous other findings which reveal that the impact on each pipeline would not differ greatly. Neither pipeline would benefit or suffer financially more or less than the other by the outcome of the case (J. A. 100). Natural's supply deficiency, expressed as a percentage of annual requirements, was greater than Transco's (J. A. 63, 69). Existing customers of the distribution companies which presented evidence at the hearing would not be put in jeopardy by grant or denial of the abandonment (J. A. 98). The Commission's Staff contended that Natural had the greater need for the gas. Thus, the Commission, having reviewed the Examiner's decision, concluded that need was not a controlling element in the case (App. C, pp. A26-27). On rehearing, the Commission directly discussed the Michigan Consolidated case, and held that its determination was not inconsistent with that case (App. D, pp. A32-33).

Where important factors an agency must consider in a comparative hearing leave little to choose between competing claimants, it has been held that the agency may hold other considerations decisive. In *Allentown Broadcasting Corp.* v. *F. C. C.*, 222 F. 2d 781 (D. C. Cir., 1954), the court reviewed a decision of the Federal Communications Commission (FCC) involving mutually exclusive applications to construct radio stations to serve two neighboring communities. The FCC had made findings that the needs of the two communities and the ability of the two applicants to serve the respective communities were almost equally balanced, that "slight differences between the two . . . fairly well cancelled out" and that " 'there is little room for choice between the two communities.' " (222 F. 2d at

783.) In light of the near equivalence of these factors, the FCC based its decision instead upon the fact that one community had only one station and the policy that residents should be given a choice in programming.

The Court of Appeals acknowledged the validity of the legal proposition formulated by the FCC but reversed because the findings on near equivalence of comparative ability to serve the respective communities did not appear to the court to be supported by substantial evidence on the record. The Supreme Court, in turn, reversed the Court of Appeals. It disagreed with respect to the substantial evidence issue. It also held that, even in the absence of near equivalence with respect to the "ability to serve" issue, it was within the FCC's discretion (given near equivalence in need) to make choice in programming decisive; *FCC* v. *Allentown Broadcasting Co.*, 349 U. S. 358, 361-62 (1955).

Allentown demonstrates that an agency is not necessarily wedded to decision based on any one factor in a comparative inquiry and, more importantly, that the reviewing court is not to substitute its judgment for that of the agency on the relative importance of a policy factor. When a factor such as comparative need or ability to serve, however important, does not really distinguish two competing applicants, the agency may turn to factors which might not be decisive in the context of a significant difference in comparative need.

Allentown (together with the cases cited in Section A) fully supports the Commission's decision in Opinion No. 655. The Commission concluded, given the insignificant difference in comparative need, that the policy of honoring settlement agreements should control.

The Commission explained its reasons for favoring this factor—the desirability of enhancing long-range planning and contract stability and of encouraging settlement agreements. Such agreements are also necessary administratively to the Commission's performance of its burdensome tasks,

as recognized by the D. C. Circuit in *Pennsylvania Gas and Water Company* v. *F. P. C.*, 453 F. 2d 1242 (D. C. Cir., 1972). Obviously, the Commission should not be required to go to almost infinite lengths to hold further hearings for the purpose of expanding the record on comparative need and deciding a factual question with metaphysically precision when it is clear that there is substantial equivalence in need.[2] Rather, it may recognize the truly significant factors and accord them proper weight—a task it accomplished in Opinion No. 655.

C. The Decision of the Court of Appeals Will Impede the Commission in Fulfilling Its Duties Under the Act.

The Opinion of the Court of Appeals, by overruling the Commission's policy determination, has unduly restricted its authority under the Act generally and deprived it of an important tool in dealing with the current gas shortage.

The ability of the Commission to establish policy for the natural gas industry is crucial, particularly during this period of gas shortage[3] when the Commission is attempting to cope with conditions unprecedented in the regulatory history of the natural gas industry. The Commission, facing this abrupt and unanticipated challenge to the adequacy of its traditional regulatory methods, has utilized a number of experimental methods for allocating available gas and alleviating the supply shortage. For example, the Commission is currently attempting to utilize the abandonment provision of the Act to allocate scarce gas supplies in *United Gas Pipe Line Company*, Docket No. CP73-117. In light of this present situation, any inroads upon the Congressional delegation of power to the Commission are undesirable.

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2. We agree with the court below that "the fact that all need gas does not mean that all need it equally." (App. A, p. A8.) But this exercise in logic must be leavened with the realization that the importance of comparative need diminishes as the difference in need diminishes.

3. Recognized by this Court in *F. P. C.* v. *Louisiana Power & Light Co.*, 406 U. S. 621, 626 (fn. 2) (1972).

The broad impact of the gas shortage on the public interest mandates that the Commission not be handcuffed in fleshing out Section 7(b) or other provisions of the Act and making the pragmatic adjustments required to meet these new conditions now evolving within the industry.

The FPC may not be able to gauge precisely the effect that its failure to honor settlement agreements will have on the pipelines' long-term supply programs. However, absent abuse of discretion, it is the Commission to which is delegated the task of weighing the probable effect of its policies and balancing competing interests—not the Court of Appeals. See *Public Service Commission of the State of New York* v. *F. P. C.*, 463 F. 2d 824, 828 (D. C. Cir., 1972); *Public Service Commission of the State of New York* v. *F. P. C.*, 467 F. 2d 361, 369 (D. C. Cir., 1972).

For the Commission to act effectively to allocate limited gas supplies and to augment the short gas supply, it is necessary that the Commission be able to respond to new conditions. The Act contains the necessary flexibility, for the standard of public convenience and necessity has no precise, static content. It is the Commission which determines that content in the context of particular factual situations. However, the Court of Appeals' decision in this case destroys the possibility of effective regulatory action. This is true if the court's decision is considered only as an interpretation of Section 7(b) of the Act. This observation is even more valid if the court's decision has broader applicability, signaling greater intervention by the courts, fettering the Commission in exercising all the regulatory functions committed to it by the Act.

D. The Court of Appeals Erred in Rejecting the Standard of Unequivocal Public Necessity Adopted by This Court.

The Commission reasoned in Opinion No. 655 that the contracts made pursuant to the Commission-approved settlement agreement should be honored by it absent circumstances of

"unequivocal public necessity" (App. C, p. A27). The Court of Appeals completely rejected this standard as inappropriate for a Section 7(b) proceeding. This disposition by the Court of Appeals conflicts with the structure of the Act developed by this Court in the *Permian* case. This Court there stated that the regulatory system is premised on private contractual arrangements which are not to be abrogated absent "unequivocal public necessity" (390 U. S. at 822).

Contrary to the indication of the court below (App. A, p. A9, fn. 11), *Permian* was not relied on by the Commission "out of context", as demonstrated by the passage quoted by the court. The Natural Gas Act is "premised" on contractual arrangements, and the statement is not limited to rate sections to the exclusion of any other section. The difference in the cases as between rates and abandonment merely reflects the application of a principle to different circumstances; it does not call for an alteration of the principle.[4] *Permian* requires an "unequivocal"— *i.e.*, clear—showing that some factor of public interest (such as relative need) would be disserved. Thus, the Commission was fully justified in calling for a clear showing of public necessity, and was further justified in concluding that the numerous other factors developed on the record and ruled on by the Examiner did not, in balance, amount to such a clear showing.

The importance of settlements must also be considered, and the policy in favor of supporting agency-approved settlements.[5] The Commission was fully entitled, within the ambit of its delegated discretionary authority and specialized knowledge, to place dispositive reliance on contract and settlement, absent

4. The court below has recently recognized the importance of private contractual agreements; *Anderson Power and Light of the City of Anderson, Indiana* v. *F. P. C.*, 481 F. 2d 490 (D. C. Cir., 1973).

5. See *Texas Eastern Transmission Corp.* v. *F. P. C.*, 306 F. 2d 345 (5th Cir., 1962); *City of Chicago* v. *F. P. C.*, 385 Fd 2d 629 (D. C. Cir., 1967).

significant countervailing considerations, and, under these circumstances, the court below erred in substituting its judgment for that of the Commission.

The court below, in its attempt to force the concepts of public convenience and necessity into a rigid standard, also demonstrates a lack of understanding of the realities of the natural gas industry. A principal example is its reference to the "presumption in favor of continued service" (App. A, p. A11). This presumption certainly would have application if a pipeline, at the end of its contract term, sought to abandon service to a distribution company, the latter lacking economic resources and reasonable access to an alternative supply of gas. Here two large pipelines are involved, each having numerous suppliers in various supply areas, who program deliveries and budget expenditures in reliance on contracts and settlements. The Commission, in recognizing the need for a contract stability (App. A, pp. A26-27), was, in fact, creating a regulatory climate which would help insure adequate service rather than uncertainty, which would undermine long-range planning. Therefore, the court's rationale for overturning the Commission's reliance on the settlement is not well founded. Certainly, any notion of a presumption in favor of continued service has little meaning here.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

INITIAL OPINION OF THE COURT OF APPEALS

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U. S. App. D. C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 73-1410

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

THE PEOPLES GAS LIGHT AND COKE COMPANY AND NORTH SHORE GAS COMPANY
THE BROOKLYN UNION GAS COMPANY
NATURAL GAS PIPELINE COMPANY OF AMERICA
MARATHON OIL COMPANY
MONSANTO COMPANY
CITY OF CHICAGO, A MUNICIPAL CORPORATION
MOBIL OIL CORPORATION
ASSOCIATED GAS DISTRIBUTORS
NORTHERN ILLINOIS GAS COMPANY
PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK

No. 73-1412

PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

THE BROOKLYN UNION GAS COMPANY
THE PEOPLES GAS LIGHT AND COKE COMPANY AND NORTH SHORE GAS COMPANY
NATURAL GAS PIPELINE COMPANY OF AMERICA
MARATHON OIL COMPANY
MOBIL OIL CORPORATION
MONSANTO COMPANY
TRANSCONTINENTAL GAS PIPE LINE CORPORATION
CITY OF CHICAGO, A MUNICIPAL CORPORATION
ASSOCIATED GAS DISTRIBUTORS
NORTHERN ILLINOIS GAS COMPANY

No. 73-1558

ASSOCIATED GAS DISTRIBUTORS, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

NORTHERN ILLINOIS GAS COMPANY
NATURAL GAS PIPELINE COMPANY OF AMERICA
THE PEOPLES GAS LIGHT AND COKE COMPANY AND NORTH SHORE GAS COMPANY
MARATHON OIL COMPANY
PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK
TRANSCONTINENTAL GAS PIPELINE CORPORATION
CITY OF CHICAGO

No. 73-1575

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

NORTHERN ILLINOIS GAS COMPANY
THE PEOPLES GAS LIGHT AND COKE COMPANY AND
NORTH SHORE GAS COMPANY
NATURAL GAS PIPELINE COMPANY OF AMERICA
ASSOCIATED GAS DISTRIBUTORS
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK
MOBIL OIL CORPORATION
MARATHON OIL COMPANY
CITY OF CHICAGO
TRANSCONTINENTAL GAS PIPE LINE CORPORATION, INTERVENORS

Petitions for Review of Orders of the Federal Power Commission

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Decided November 12, 1973

Thomas F. Ryan, Jr., with whom *Robert G. Hardy* and *Lawrence H. Gall* were on the brief, for Transcontinental Gas Pipe Line Corporation.

Richard A. Solomon with whom *Peter H. Schiff*, General Counsel, was on the brief for Public Service Commission for the State of New York. *Michael H. Rosenbloom* also entered an appearance for the Public Service Commission for the State of New York.

John Frederick Moring and *Richard G. Morgan* were on the briefs for Associated Gas Distributors.

William I. Harkaway and *Robert A. Froehlch* were on the briefs for Consolidated Edison Company of New York, Inc., Petitioners in No. 73-1575.

William M. Sawyer, Attorney, Federal Power Commission with whom *Leo E. Forquer,* General Counsel, and *George W. McHenry, Jr.,* Solicitor, were on the brief, for respondent.

Paul E. Goldstein was on the brief for Intervenor, Peoples Gas Light and Coke Company and Natural Gas Pipeline Company of America.

Barbara M. Gunther and *Joseph P. Stevens* were on the brief for the Intervenor, The Brooklyn Union Gas Company in Nos. 73-1410 and 73-1412.

Mark Goldstein was on the brief for the Intervenor City of Chicago.

J. Stanley Stroud was on the brief for the Intervenor, Northern Illinois Gas Company.

Thomas P. Hamill was on the brief for the Intervenor, Mobil Oil Corporation.

Philip R. Ehrenkranz and *Carroll Gilliam* also entered an appearance for Intervenor, Mobil Oil Corporation.

William A. Sackmann entered an appearance for Intervenor, Marathon Oil Company.

Richard F. Generelly entered an appearance for Intervenor, Monsanto Company.

Before: WRIGHT, ROBINSON and MACKINNON, *Circuit Judges.*

PER CURIAM: This case involves petitions to review orders of the Federal Power Commission (the Commission) granting abandonment of natural gas supplies in the context of a critical nation-wide fuel shortage. As such, it raises important issues relating to the proper standard to be applied in natural gas abandonment proceedings for the foreseeable future. All parties

to this controversy agree that an early determination of the issues is necessary and this court has acted accordingly.[1]

I

The facts of this case are fully stated in the Presiding Examiner's Initial Decision;[2] we only summarize here those necessary to understand the precise issues decided. Petitioner, Transcontinental Gas Pipe Line Corporation (Transco), and intervenor Natural Gas Pipeline Company of America (Natural), are natural gas pipelines engaged in the transportation and sale of natural gas in interstate commerce.[3] Transco and Natural have purchased natural gas production from the La Gloria field area in Texas since the late 1940's and early 1950's respectively. In the middle 1950's, the La Gloria producers contended they could not continue to meet the requirements of both companies and still have adequate gas for other needs. For this reason the producers attempted to discontinue service to Natural by invoking certain "escape clauses" in their contracts. Pending court review of a Commission decision[4] disallowing the proposed discontinuance, the producers and Natural agreed upon a settlement of the controversy. The settlement agreement, as approved by the Commission,[5] provided for a substantial reduction in deliveries to Natural and the continued delivery of 81,000 Mcf per day[6] to Transco until its contract with the producers expired

1. Scheduling of oral argument in this case has been expedited twice and the opinion rendered expeditiously because of the urgency for a speedy decision.

2. Hilda B. Weinert, 49 FPC —— (June 2, 1972) (Presiding Examiner's Initial Decision); J. A. at 55.

3. Transco serves the Atlantic Seaboard, including New York City; Natural serves the Midwest, including Chicago. *Id.*

4. Argo Oil Corp., 15 FPC 622 (1956).

5. Argo Oil Corp., 20 FPC 208 (1958).

6. [T]he average customer using gas for winter residential space heating in the market area in question uses 1½ Mcf/d (M=thousand, c=cubic, f=feet, d=day). Hilda B. Weinert, 49 FPC ...., ... (June 2, 1972) (Presiding Examiner's Initial

in 1971. The quid pro quo for acceptance by Natural of the reduced deliveries was a contract with the producers that dedicated all the natural gas reserves in the La Gloria Field to Natural and required the producers to seek abandonment of deliveries of the 81,000 Mcf per day to Transco when its contract expired.[7] Although Transco was not a party to the settlement agreement, it had intervened in the original proceeding before the Commission.

In early 1971 after Transco's contract expired, the La Gloria producers filed applications with the Commission to abandon sales to Transco. These applications were consolidated and hearings were held in the fall of 1971. The Comission, reversing the decision of the Presiding Examiner, granted the applications for abandonment and certificated the sale of the abandoned gas to Natural. Thus Natural presently is receiving the 81,000 Mcf per day formerly delivered to Transco. Upon denial of its request for a rehearing before the Commission, Transco filed the instant petitions for review with this court. We vacate the orders of the Commission, restore the parties to the status quo ante, and remand the case to the Commission.

II

Based upon an extensive and careful review of the evidence, the Presiding Examiner found, *inter alia,* that Transco had greater need for the La Gloria field gas than Natural. Accordingly, he denied the application for abandonment pursuant to the comparative need standard enunciated by this court in *Michigan Consolidated Gas Co.*, v. *FPC*, 108 U. S. App. D. C. 409, 283 F. 2d 204, *cert. denied,* 364 U. S. 913 (1960). On review, the Commission reversed the Examiner's decision,

Decision); J. A. at 57. Thus the 81,000 Mcf per day of natural gas contested in this case is sufficient to meet the needs of approximately 54,000 residential households.

7. Thus, if abandonment were approved, Natural would receive the volumes of natural gas formerly delivered to Transco.

ordered abandonment and certificated sale of the gas to Natural. In its decision the Commission stated that the comparative need standard[8] was not appropriate in the context of this case, which involves: (1) a critical natural gas shortage in all areas of the country, (2) the expiration of Transco's contract with the La Gloria producers, and (3) Natural's contract rights to the gas under the 1958 Commission approved settlement agreement. For these reasons the Commission formulated a new standard that would give controlling weight to the settlement agreement absent "compelling proof" of countervailing "unequivocal public necessity."

III

Section 7(b) of the Natural Gas Act, 15 U. S. C. § 717 f(b) (1970), provides that abandonment of natural gas facilities or services subject to the Commission's jurisdiction can be granted only "after due hearing, and a finding by the Commission . . . that the present or future public convenience or necessity permit such abandonment." In *Michigan Consolidated, supra* at 419, 283 F. 2d at 214, this court, in considering the criteria for abandonment under § 7(b), recognized two important principles: (1) a pipeline which has obtained a certificate of public convenience and necessity to serve a particular market has "an obligation, deeply embedded in the law, to continue service," and (2) the burden of proof is on the applicant for abandonment to show that the "public convenience and necessity" permits abandonment, that is, that the public interest "will in no way be disserviced" by abandonment.

The fundamental tenets established by *Michigan Consolidated* are that the public interest is the ultimate criterion under § 7(b)

8. In its Order Denying Rehearing and Partial Stay, J. A. at 151, 152, the Commission stated that the comparative space heating saturation test employed in *Michigan Consolidated* is not appropriate to the facts of this case. Although the Commission failed to explain why this is so, it erred more fundamentally in not recognizing that the public interest requires a more broadly conceived comparison of need than it made in this proceeding. *See* note 13 and accompanying text, *infra*.

and that all factors relevant to the determination of which course of action best promotes the overall public interest must be fully considered. The Commission there proposed, and this court accepted, a comparative needs test which balanced the relative needs of the competing pipelines and their ultimate consumers as the principal index of the public interest.

Against these principles of statutory and case law, it is clear that the Commission's orders cannot stand. At bottom, the Commission's decision stands for the simple proposition that where all parties need contested gas supplies the party having a contractual right to such gas will prevail. This proposition possesses the alluring qualities of simplicity and precision; inded, it seems to have so mesmerized the Commission that it abdicated its statutory responsibility to guarantee that the overall public interest "will in no way be disserviced" by abandonment. Simply stated, the Commission apparently failed to perceive that the fact that all need gas does not mean that all need it equally.[9] The approach thus taken failed to consider adequately and fully all the factors relevant to an intelligent determination of the overall public interest.

The Commission also erred in according dispositive weight to private, albeit Commission approved,[10] contractual arrange-

9. In the instant proceeding, both pipelines are in short supply of natural gas and each is rendering less than full service to its customers. The loss of this gas to either pipeline will result in a diminution of its ability to continue even current levels of service. Under these circumstances, we find no showing of unequivocal public necessity for abrogating the contracts of the parties.
Hilda B. Weinert, 49 FPC ...., ... (Opinion No. 655, March 21, 1973); J. A. at 107, 118. The Commission never adequately refuted the Examiner's finding that Transco had the greater need for the natural gas.

10. A finding by the Commission that a settlement resolving an immediate controversy would be in the public interest in 1958 cannot be construed to be sufficiently binding to preclude or restrict in any sense a new and comprehensive determination of the public interest as it exists in 1973. Indeed, the Commission itself apparently recognized this in its order approving the 1958 settlement:

(Continued on Next Page)

ments absent a showing of countervailing "unequivocal public necessity."[11] The Commission essentially argues that failure to honor long term gas acquisition contracts would be "disastrous since no pipeline would be able to plan for the future."[12] Clearly there are advantages to insuring as great certainty in gas acquisition plans as is possible. Moreover, if such plans and contracts are not given significant weight, then a pipeline in

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> Nothing contained herein shall be construed as a waiver of the requirements of Section 4 or 7 of the Natural Gas Act, or of the Commission's regulations thereunder, and is without prejudice to any finding or orders which have been or may hereafter be issued by the Commission in any proceeding now pending or hereafter instituted by or against any of the parties to these proceedings.

Argo Oil Corp., 20 FPC 208, 210 (1958).

11. The Commission focused on language quoted out of context from *Permian Basin Area Rate Cases*, 390 U. S. 747, 822 (1968):

> The regulatory system created by the [Natural Gas] Act is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity.

Permian, of course, involved rate regulation and did not consider the sanctity of private contracts in the context of abandonment proceedings under § 7(b). The situation confronting the Court in *Permian* involved producers who were dissatisfied with their contract prices which were not as high as would be permissible under the maximum area rates subsequently fixed by the Commission. The decision holds that such "improvident bargains" could not be relieved absent injury to the public interest, such as impaired ability to maintain adequate service to the consuming public.

In the instant abandonment proceeding, loss of the La Gloria gas will directly result in further curtailment of existing service to present customers of the losing pipeline. The public interest is jeopardized and "unequivocal public necessity" is demonstrated whenever private contracts substantially impair the ability of a pipeline to maintain adequate levels of service to its customers. In this situation, contract rights should be considered as but one of the important factors to be weighed in the balancing process set forth in this opinion.

12. Hilda B. Weinert, 49 FPC ——, —— (Opinion No. 655, March 21, 1973); J. A. at 107, 117.

Transco's position might not be inclined, or at least would not have as great an incentive, to seek new sources of supply to replace those lost upon expiration of its contracts. Thus it is conceded that private, long term contracts, at least where they are part of a Commission approved settlement agreement, must be accorded significant weight in the determination of the overall public interest. But to argue that anything less than controlling weight would be "disastrous" grossly overstates the case. Rigid deferral to contractual arrangements without a searching inquiry into other factors relevant to the public interest as required by § 7(b) simply is an inadequate means to assure vindication of the transcendant interests of the public.

IV

It is appropriate to reiterate here the principle that guides our review of abandonment orders as stated in *Michigan Consolidated:*

> Where, as here, a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration. These limits are not to be confused with the narrower ones governing review of an agency's conclusions reached upon proper consideration of the relevant factors.

Supra at 431, 283 F. 2d at 226.

We contemplate on remand, therefore, a searching and comprehensive inquiry by the Commission into all factors relevant to determining the overall public interest in this abandonment proceeding. For this purpose it will doubtless be necessary to supplement the record with additional evidence with respect to these factors. Primary importance must be given to a broadly conceived [13] comparison of the needs of the two natural gas

13. The Presiding Examiner noted that the Commission staff had proposed eleven criteria for comparing the needs of the two pipeline systems. Several of these were not considered because of insufficient evidence, difficulty of meaningful comparison or their speculative nature. Hilda B. Weinert, 49 FPC ——, —— (June

systems and the public markets they serve. Additionally, the Commission should consider the environmental effects of its decision (*See Arizona Public Service Co.* v. *FPC*, —— U. S. App. D. C. ——, —— F. 2d —— (No. 72-1636, July 30, 1973)), the economic effect on the pipelines and their consumers, the presumption in favor of continued service and the relative diligence of the respective pipelines in providing for adequate natural gas supplies.[14] As discussed previously, the Commission should also accord significant weight to Natural's contract rights that resulted from the 1958 Commission approved settlement agreement. For the purpose of judicial review it is, of course, essential that the Commission's findings with respect to the factors it considered in determining the public interest be apparent from its opinion.

We recognize that the balancing process we impose upon the Commission is a complex one, but we perceive no acceptable alternative that would guarantee that the public interest "will in no way be disserviced" in abandonment proceedings. Accordingly, the orders of the Commission are vacated, the parties are restored to the status quo ante,[15] and the case is remanded to the Commission for further proceedings not inconsistent with this opinion.

So ordered.

2, 1972) (Presiding Examiner's Initial Decision); J. A. at 55, 95. The Commission, of course, is not bound by these proposals, but it should exercise its expertise to insure that all relevant and meaningful indices of comparative need are considered.

14. A certain tension is created by the fact that the less diligent pipeline often might, by definition, have greater need for the contested gas supplies. Nevertheless, the more diligent pipeline should be favored if such preferential treatment would not be inconsistent with the overriding public interest in a particular case.

15. Delivery of the 81,000 Mcf per day of natural gas to Transco shall be restored as quickly as possible.

APPENDIX B

OPINION AND GRANTING CLARIFICATION AND DENYING REMAINING MOTIONS

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U. S. App. D. C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 73-1410

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
THE PEOPLES GAS LIGHT AND COKE COMPANY AND NORTH SHORE GAS COMPANY
THE BROOKLYN UNION GAS COMPANY
NATURAL GAS PIPELINE COMPANY OF AMERICA
MARATHON OIL COMPANY
MONSANTO COMPANY
CITY OF CHICAGO, A MUNICIPAL CORPORATION
MOBIL OIL CORPORATION
ASSOCIATED GAS DISTRIBUTORS
NORTHERN ILLINOIS GAS COMPANY
PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK

No. 73-1412

PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
THE BROOKLYN UNION GAS COMPANY
THE PEOPLES GAS LIGHT AND COKE COMPANY AND NORTH SHORE GAS COMPANY
NATURAL GAS PIPELINE COMPANY OF AMERICA
MARATHON OIL COMPANY
MOBIL OIL CORPORATION
MONSANTO COMPANY
TRANSCONTINENTAL GAS PIPELINE CORPORATION
CITY OF CHICAGO, A MUNICIPAL CORPORATION
ASSOCIATED GAS DISTRIBUTORS
NORTHERN ILLINOIS GAS COMPANY

No. 73-1558

ASSOCIATED GAS DISTRIBUTORS, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
NORTHERN ILLINOIS GAS COMPANY
NATURAL GAS PIPELINE COMPANY OF AMERICA
THE PEOPLES GAS LIGHT AND COKE COMPANY AND NORTH SHORE GAS COMPANY
MARATHON OIL COMPANY
PUBLIC SERVICE COMMISSION FOR THE STATE OF NEW YORK
TRANSCONTINENTAL GAS PIPELINE CORPORATION
CITY OF CHICAGO

No. 73-1575

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT
NORTHERN ILLINOIS GAS COMPANY
THE PEOPLES GAS LIGHT AND COKE COMPANY AND
NORTH SHORE GAS COMPANY
NATURAL GAS PIPELINE COMPANY OF AMERICA
ASSOCIATED GAS DISTRIBUTORS
PUBLIC SERVICE COMMISSION FOR THE
STATE OF NEW YORK
MOBIL OIL CORPORATION
MARATHON OIL COMPANY
CITY OF CHICAGO
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
INTERVENORS

On Motions for Clarification and Rehearing
and for Recall of Mandate and Stay of
Reissuance of Mandate

Decided November 21, 1973

Before WRIGHT, ROBINSON AND MACKINNON, *Circuit Judges.*

ORDER

On consideration of the petitions for clarification and for rehearing and of the motions for recall of mandate and for stay of reissuance of mandate, it is

ORDERED by the Court that the aforesaid petition for clarification is granted and the remaining motions are denied in accord with the Per Curiam opinion of this Court attached hereto, to be published at a later date.

Per Curiam.

PER CURIAM: Intervenor Natural Gas Pipe Line Company of America, in an emergency motion, has petitioned this court to clarify the opinion and order in the above captioned case, and to direct the Federal Power Commission on remand to allocate equitably the remaining supplies of natural gas in the La Gloria Field pending final disposition. It has also filed a petition for rehearing, a motion for recall of mandate and for stay of reissuance of mandate pending action on petition for rehearing. We clarify the opinion and order as hereinafter set forth but decline to enter any further directive to the Federal Power Commission.

The language of the opinion and order "the parties are restored to the status quo ante," as amplified by note 15, means that all parties are now restored to the respective daily volumes of natural gas to which they would have been entitled absent the grant of abandonment.

With respect to the slip opinion, page 12, footnote 15 is stricken and the following is inserted in lieu thereof:

> [15] Delivery of the daily volumes of natural gas to which Transco is entitled under the status quo ante shall be restored as quickly as possible.

The petition for rehearing, the motion to recall mandate and for stay of reissuance of mandate pending action on petition for rehearing are all denied.

Judgment accordingly.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 655

HILDA B. WEINERT AND JANE W. BLUMBERG, *et al.*	Docket Nos. G-2730, *et al.*

OPINION AND ORDER AUTHORIZING ABANDONMENT OF, AND ISSUING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY FOR, THE SALE OF NATURAL GAS

Issued: March 21, 1973.

APPEARANCES

Roscoe C. Elmore and *R. D. Haworth* for Mobil Oil Corporation.

Edward H. Forgotson for Ruth Phillips Bisiker and Grampian Company Limited.

Richard F. Generally and *B. L. Allen* for Monsanto Company.

Charles E. McGee, John T. Ketcham, Robert J. Haggerty and *Edward J. Kremer* for Atlantic Richfield Company.

William A. Sackmann for Marathon Oil Company.

Clyde E. Willbern and *Jack L. Brandon* for Getty Oil Company.

William W. Brackett and *Raymond Petersen* for Natural Gas Pipeline Company of America.

Richard L. Curry and *Mark Goldstein* for the City of Chicago.

William E. Doyle and *David R. Frick* for Northern Illinois Gas Company.

Peter V. Fazio for Illinois Power Company.

William I. Harkaway and *Robert A. Froehlick* for Consolidated Edison Company of New York, Inc.

Richard M. Kates for The Clean Air Coordinating Committee.

Gerald D. Mindell for The Peoples Gas Light and Coke Company.

Frederick Moring, John E. Holtzinger, Jr. and *Denis Neill* for Associated Gas Distributors.

J. Harry Mulhern, James R. Lacey, Edward S. Kirby and *R. M. Nelson* for the Public Service Electric and Gas Company of New Jersey.

Thomas F. Ryan, Jr., Richard J. Connor, Robert G. Hardy, Lawrence H. Gall, William N. Bonner, Jr., and *R. V. Loftin* for Transcontinental Gas Pipe Line Corporation.

William J. Scott, Peter A. Fasseas and *Thomas Cassidy* for the Illinois Commerce Commission and the People of the State of Illinois.

Richaord A. Solomon and *Peter H. Schiff* for the Public Service Commission of the State of New York.

Joseph P. Stevens and *Barbara M. Gunther* for The Brooklyn Union Gas Company.

Dale A. Wright and *Clyde E. Willbern* for Piedmont Natural Gas Company, Inc.

Russell B. Mamone for the Staff of the Federal Power Commission.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Rush Moody, Jr.

HILDA B. WEINERT AND JANE W. BLUMBERG, *et al.*	Docket Nos. G-2730, *et al.*

OPINION NO. 655

OPINION AND ORDER AUTHORIZING ABANDONMENT OF, AND ISSUING CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY FOR, THE SALE OF NATURAL GAS.

(Issued March 21, 1973)

MOODY, COMMISSIONER:

1. This case comes before us on exceptions to the Administrative Law Judge's Initial Decision issued on June 2, 1972, in which he found that the producer/applicants may not abandon the sale of natural gas from the La Gloria Field to Transcontinental Gas Pipeline Corporation (Transco), and obtain certificate authorization thereafter to sell these volumes of natural gas to Natural Gas Pipeline Company of America (Natural).

Initial Decision

2. In his Initial Decision, the Administrative Law Judge determined that, in a proceeding involving the potential abandonment of producer sales to one interstate pipeline company and the certification to another pipeline of the volumes of gas released by such abandonment, controlling weight must be given to the comparative needs of the competing pipelines. The Administrative Law Judge then found that, based on the evidence

developed on the record, Transco had shown the greater need for the gas and, accordingly, the abandonment of sales to Transco must be denied. For the reasons given below, we find that this decision is in error and must be reversed.

Exceptions

3. Natural, its supporting intervenors, and Staff except to the Initial Decision on the grounds that (1) the controlling factor should be the contracts executed by Natural and the producers as embodied in a 1958 settlement agreement approved by the Commission in Docket No. G-6810, *et al.*, 20 FPC 208, and (2) assuming *arguendo* that comparative needs is the proper standard, Natural, by a preponderance of the evidence, has shown the greater need for this gas.

4. Transco and its supporting intervenors generally agree with the Initial Decision, and except only to the Administrative Law Judge's finding that the record in this case is complete enough to determine the comparative needs of both pipelines. The Public Service Commission of New York (New York), although in agreement with the result, excepts to the finding in the Initial Decision that comparative need is the appropriate standard. New York asserts that substantial weight must be given to the statutory policy against disrupting continued service.

Discussion

5. The Administrative Law Judge dismissed the arguments of almost all of the parties that the standard of comparative need enunciated by the court in *Michigan Consolidated Gas Co.* v. *F. P. C.*[1] is not the applicable standard here, asserting that "no party has come forward with any test other than comparative need which would permit the Commission to discharge its statutory obligation." The Administrative Law Judge sought to

1. 283 F. 2d 204 (CADC, 1960), cert. denied, 364 U. S. 913 (1960).

apply the statutory standard under the Natural Gas Act (Act) as contained in Section 7(b), to the instant proceeding, and dealt only with the issue of whether "the present or future public convenience or necessity permit such abandonment."[2]

6. Our Staff argues that the Administrative Law Judge approached this case from the wrong direction, *i.e.*, he focused his attention entirely upon the abandonment issue and ignored the issue of whether the producers had shown a public convenience and necessity sufficient to warrant the certificating of these volumes to Natural.

7. In cases such as this, where a shift in interstate purchasers is proposed, Staff correctly apprehends that our decision must balance public convenience and necessity under two sections of the Natural Gas Act, Section 7(b) and Section 7(e). While abandonment is authorized under 7(b) if the public convenience and necessity "permits", certification under 7(e) follows a finding that the public convenience and necessity "requires" the proposed service. When we are called upon to decide a case involving both sections, we cannot lawfully apply one section, to the exclusion of the other.

8. The error implicit in deciding abandonment issues before determining the question of certification would be apparent in a case where abandonment is authorized, but certification is not. In such a situation, though the applicants sought to shift gas supplies from one to another interstate purchaser, the result would be a loss of the gas supply to the interstate market. This result can be avoided by first examining whether a certificate should issue, absent a claim of entitlement by another purchaser; if so, the question of abandonment can then be resolved with full assurance that the interstate market will be fully protected, regardless of the outcome of the abandonment case.

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2. Natural Gas Act, 15 U. S. C. § 717 f(b).

The Natural Certificate Issue

9. Absent any claim of entitlement by Transco, should sale of this gas to Natural be certificated? The Administrative Law Judge found that Natural required no additional facilities to take the increased volumes of La Gloria Field gas. Transco excepts to this finding arguing that Natural has been able to meet substantially all of the requirements of its customers during the winter seasons 1971-1972 and 1972-1973. Under these circumstances, Transco argues that Natural either has excess winter capacity on its system, or intends to sell additional volumes of gas to its customers (for which there has been no application filed with the Commission), or must cut back on takes from other suppliers in order to take these additional volumes.

10. In response, Natural argues that it has sufficient system winter capacity to take all the La Gloria Field gas without selling additional volumes to its customers or cutting back its takes from other suppliers. Natural argues that the record shows that the maintenance of deliveries during the winters of 1971-1972 and 1972-1973 has been accomplished by retaining part of its storage capacity for its own use rather than allocating such capacity to its customers under its storage rate schedule.

11. The Administrative Law Judge correctly found that no additional facilities will be required for Natural to take the additional La Gloria Field gas and that the La Gloria Field gas will assist Natural in filling its main line facilities during winter periods with no cutbacks from other sources of supply. Natural's need for the La Gloria gas to meet existing sales commitments is clear.

12. The record further shows that the price to be paid for La Gloria Field gas will be the rates as prescribed in Opinion 595.[3]

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3. *Area Rate Proceeding, et al.* (Texas Gulf Coast Area), 45 FPC 674 (1971).

13. Under traditional 7(e) standards, we find that certification of the proposed sales to Natural, is required by the public convenience and necessity.

Transco Abandonment Issue

14. The La Gloria producers seek to abandon sales to Transco, invoking Section 7(b) which provides:

> "No natural-gas company shall abandon . . . any service rendered by means of such [jurisdictional] facilities, without the permission and approval of the Commission first had and obtained, after due hearing and a finding that the available supply of natural gas is depleted to the extent that the continuation of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment. 15 U. S. C. 717f(b)."

We agree with New York, Transco, and Transco's supporting intervenors that 7(b) expresses a statutory policy against disruption of existing service, but it is equally clear that disruption is to be permitted if the Commission finds (a) depletion of the available supply *or* (b) that the public convenience or necessity permit disruption.

15. We conclude that abandonment should be permitted and approved, basing our conclusion upon our finding that the public convenience and necessity permit abandonment. Our findings are impelled by the record before us.

16. Following establishment of La Gloria production in the mid-1940's, Transco entered into purchase agreements, the earliest dated in 1947. Thereafter, in 1950, Natural contracted to buy gas from the La Gloria producers.

17. In 1952 Transco and Natural were each purchasing gas produced in the La Gloria Field, Jim Wells and Brooks Counties, Texas. The sellers to Transco and Natural were the same. During 1953, the producers began to reduce the volume of their deliveries to Natural, provoking a dispute between the producers

and Natural as to whether the producers were delivering the appropriate quantities under their contracts to Natural. At that time, the contract quantity of Natural from the field was 85,000 Mcf per day. The producers contended that the field had inadequate deliverability to satisfy the contract entitlements of Transco and Natural and still meet the producer's need for gas for recycling and other operations.

18. While the dispute over deliverability was pending, the producers attempted to invoke an "escape clause" in their contracts with Natural by serving on Natural notices of termination of their contracts. In 1954 Natural filed complaints against the producers at Docket Nos. G-2950 and G-2951.

19. Transco petitioned to intervene in *Argo Oil Corp., et al.*, Docket No. G-2951, by filing dated November 29, 1954, and stated:

> "In view of the foregoing it is indisputably clear that Transcontinental may be deprived of a valuable contract right in total disregard of the administrative standards imposed by due process of law if the relief requested by Texas Illinois [Natural] is subsequently granted by the Commission without affording Transcontinental an opportunity to be heard and to participate in the proceedings." (Transco's Petition to Intervene in Docket No. G-2951, page 7.)

20. On January 10, 1955, the Commission issued orders to show cause against the producers at Docket Nos. G-6810 and G-6811. These four dockets were consolidated as *Argo Oil Corp., et al.* Transco was granted intervention in the consolidated proceeding (See 15 FPC at 603) and participated in the hearing held therein. On January 25, 1956, the Commission affirmed the Initial Decision of the presiding Administrative Law Judge which had held against the producers. (15 FPC 622.) The producers appealed to the United States Court of Appeals for the Fifth Circuit. During 1958, while the appeal was pending, the parties agreed to a settlement.

21. The 1958 settlement was embodied in the February 15, 1958, amendment to the January 25, 1950, contract between Natural and the producers. This amendment reduced Natural's contract right to purchase from this field from 85,000 Mcf per day to 35,000 Mcf per day with provision for subsequent increases and changed the term of the contract to a life of lease or of reserves contract. Transco's contract was to be unaffected.

22. We believe the fair import of the settlement to be that Transco was to continue to get its 81,000 Mcf/day until its contract expired in 1971, and abandonment of the producer-Transco sale was permitted, and Natural was to get all gas the field could produce, other than that sold to Transco and others under then existing contracts.

23. On July 14, 1958, a "Joint Motion for an Order Approving Agreement Terminating Issues and Dismissing Proceeding" was filed in *Argo Oil Corp., et al.,* Docket Nos. G-6810, *et al.* This pleading sought Commission approval of the settlement and stated:

> "The Amendment *inter alia* extends the term of the contract, thereby ultimately making available to Texas Illinois [Natural] a larger quantity of gas, and eliminates the escape clause under which Sellers heretofore gave notice of termination.
>
> * * * * *
>
> [Approval of the settlement agreement would] assure to the pipeline purchaser [Natural], its distributor customers and the public served by those distributors the continuation of the contract and a supply of gas, to be available over a period of time considerably in excess of that covered by the original contract, thus permitting a more orderly protection of future services." (Joint Motion at pp. 5-6.)

On August 15, 1958, the Commission accepted and approved the settlement, and dismissed further proceedings, stating:

> "These negotiations have resulted in the execution of a settlement agreement, dated February 15, 1958, which is

in the form of an Amendment to the 1950 contract. The Amendment, *inter alia*, revises volumetric obligations and extends the term of the contract, thereby ultimately to Texas Illinois a larger quantity of gas . . ." (20 FPC at 209.)

24. Against this background, we believe the public convenience and necessity permits abandoment. The 1958 settlement cannot be effectuated if we reach a contrary conclusion, and we are obligated to give effect to that settlement which we approved as being in the public interest. *Cf. Cities Service Gas Co.*, 38 FPC 364 (1967); *Texas Eastern Transmission Corp.* v. *F. P. C.*, 306 F. 2d 345 (CA5, 1962); *City of Chicago* v. *F. P. C.*, 385 F. 2d 629 (CADC, 1967); *Continental Oil Co.* v. *F. P. C.*, 373 F. 2d 96 (CA10, 1967). In the settlement bargain approved by the Commission in 1958, Natural and its customers gave up their claim to large volumes of gas from the La Gloria Field from the date in 1953 when Natural's purchases were reduced by the producers, and Natural received in exchange the rights to purchase additional volumes in the future as they became available (when cycling was completed in various reservoirs from time to time and when other gas purchase contracts, including Transco's expired). The producer/applicants bargained for the converse, thus avoiding a situation in which they felt they could not deliver the full stated contract quantities to all purchasers from the field at any one time. Transco, which was a party, was able to assure it would be able to take its full contract quantity for the life of its contract, even though Natural's quantity was cut for that period. Transco raised no objections to the settlement. [The bargain, when made, was in the public interest and it is no less so today.]

25. Transco argues that the public convenience and necessity aspects of this abandonment application should be judged in the light of Natural's failure to prove that its needs for this gas outweigh the needs of the existing buyer. New York argues that public convenience and necessity should be judged against a standard of refusing disruption of existing service where the

existing buyer has a demonstrable need for continued service. The Administrative Law Judge weighed comparative needs and determined that Transco has a greater present need for La Gloria gas than Natural. All three approaches to this case suffer a common failing: (They preclude consideration of the totality of "public convenience and necessity" which is ours to weigh.) It goes without saying that comparison of pipeline needs in times of shortage is a prodigious undertaking.) The defects in this standard are for more substantive, however, than the degree of difficulty in its application.

26. It is essential that the pipeline industry be able to plan and execute long-range gas supply acquisition programs. The failure to honor contracts for additional gas supplies would be disastrous since no pipeline would be able to plan for the future. There must be reasonable assurance that once an individual pipeline contracts for gas supplies, as Natural did in 1958, it may expect that contract to be fulfilled. In the first instance, the pipeline can contract for the life of the lease or for a fixed term with additional pre-emptive rights. Transco did not do so.

27. We should not be understood to say that, in all instances, the pipeline which contracts for a future gas supply will necessarily prevail over the pipeline which does not. There may be circumstances where rigid adherence to this approach would create emergencies of critical magnitude. We have examined this record to see if this is such a case.

28. In the instant proceeding Transco had the opportunity to show that there exists an unequivocal public necessity for abrogation of the Natural contract and extension of the Transco contract beyond its fixed term. We find no compelling proof that Transco's contract rights should be enlarged to include the right to continued service, nor do we find proof that the producer contracts with Natural should be disregarded. It is essential to the efficient operation of the gas industry that it be allowed to discharge its public service obligations in an orderly manner.

Certainty of contract rights cannot be absolute within a regulatory structure which calls for our review of such contracts for consistency with the public interest. We should not, however, add to that uncertainty when to do so will ultimately redound to the detriment of the industry we regulate and the customers it serves. "The regulatory system created by the Act is premised on contractual agreements voluntarily devised by the regulated companies; it contemplates abrogation of these agreements only in circumstances of unequivocal public necessity." *Permian Basin Area Rate Cases,* 390 U. S. 747, 822 (1968).

29. This is not to suggest that we will permit the abandonment of sales of gas to the interstate market in order to honor a contract for its sale in the intrastate market. Nor do we here suggest that we will countenance a switch in interstate purchasers which results from a "pirating" of supply sources. We do express our intent to facilitate the orderly functioning of the interstate pipeline industry and to disrupt that orderly functioning only when substantial emergencies dictate that we must.

30. Pipelines should be encouraged to manage their independent gas supply acquisition programs with as little external interference as the public convenience and necessity permit. We will not retrospectively substitute our judgment in the contracting process without a showing of unequivocal public necessity.

31. In the instant proceeding, both pipelines are in short supply of natural gas and each is rendering less than full service to its customers. The loss of this gas to either pipeline will result in a diminution of its ability to continue even current levels of service. Under these circumstances, we find no showing of unequivocal public necessity for abrogating the contracts of the parties.

Gas Delivered to Transco After the Expiration of its Contract

32. Natural argues that after the expiration of Transco's contracts with the producers, all of the La Gloria Field gas should have been delivered to Natural and that Transco has wrongfully taken gas which now should be repaid. We reject this argument. Natural acquired no rights to the La Gloria gas unless and until certification of the sale to it and abandonment of the Transco sale is authorized by this Commission. We do, however, put Transco on notice that continued takes of gas from the La Gloria Field producers after the issuance of this order will be subject to pay-back. Since the parties must rearrange operations consistent with this order, we will provide approximately 30 days in which to complete abandonment of sales to Transco and the sale of those volumes to Natural.

Non-Contested Delieries

33. Getty Oil Company, Monsanto Company, *et al.*, and Marathon Oil Company contracted on July 13, 1970, to deliver 40,000 Mcf/d of gas to Natural, gas which consists in part of gas previously sold intrastate to Celanese Corporation and gas available as a result of reduced cycling (Docket No. G-3732, applications filed February 25, 1971). By order entered May 24, 1971, the Commission granted these applications but, due to subsequently discovered procedural defects, the Commission rescinded the certificate (except those of Mobil Oil Corporation and Atlantic Richfield) by order entered July 21, 1971. In a separately filed brief Getty requests that the certificates be reissued and asserts in support thereof that these portions of the applications are not contested and do not involve gas which was dedicated to Transco. No one contests these allegations nor opposes granting the applications. The Administrative Law Judge found, therefore, that the present and future public necessity and convenience require the sale by those producers not

yet certificated of that portion of 40,000 Mcf/d of gas sold to Natural Gas Pipeline Company by contracts dated July 13, 1970, and that an appropriate order should be entered. We affirm this portion of the Initial Decision.

The Commission further finds:

(1) Producer/applicants are engaged in the sale for resale of natural gas in interstate commerce subject to the jurisdiction of the Commission and each is, therefore, a "natural-gas company" within the meaning of the Natural Gas Act as heretofore found by the Commission.

(2) The sales of natural gas hereinbefore described, as more fully described in the applications in this proceeding, will be made in interstate commerce subject to the jurisdiction of the Commission; and such sales by producer/applicants, together with the operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of Section 7(e) of the Natural Gas Act.

(3) Producer/applicants are able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act and the requirements, rules, and regulations of the Commission thereunder.

(4) The sales of natural gas by producer/applicants are required by the public convenience and necessity and a certificate therefor should be issued as hereinafter ordered.

The Commission orders:

(A) That producer/applicants be hereby authorized and directed to abandon and discontinue sales of natural gas in the amount of 81,000 Mcf/day from the La Gloria Field area to Transco as of April 18, 1973, in the amounts set forth in their applications.

(B) That certificates of public convenience and necessity are issued to Getty Oil Company (Docket No. G-3732), Mon-

santo Oil Company (Docket No. G-9357), and Marathon Oil Company (Docket No. G-11818) for the reasons given therefor and as ordered by the Administrative Law Judge in his Initial Decision, to become effective on the date of issuance hereof.

(C) That certificates of public convenience and necessity are issued to the producer/applicants authorizing the sale on and after April 18, 1973, of an additional 81,000 Mcf/day of natural gas from the La Gloria Field, in the amounts set forth in their applications, to Natural.

(D) From and after April 18, 1973, any further volumes of natural gas taken by Transco from the producer/applicants from the La Gloria Field shall be repaid to Natural.

(E) The Administrative Law Judge's decision issued in this proceeding on June 2, 1972, to the extent it is inconsistent with this order is reversed and set aside. Exceptions to the Administrative Law Judge's decision not granted herein are denied.

By the Commission:

KENNETH F. PLUMB,

(SEAL) *Secretary.*

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Rush Moody, Jr.

HILDA B. WEINERT and JANE W. BLUMBERG, *et al.*	Docket Nos. G-2730, *et al.*

ORDER DENYING REHEARING AND PARTIAL STAY

(Issued April 18, 1973)

Applications for rehearing of Opinion No. 655 in the above-styled proceedings were filed by Transcontinental Gas Pipe Line Corporation (Transco), Natural Gas Pipeline Company of America (Natural), Consolidated Edison Company of New York, Inc., The Public Service Commission of the State of New York (New York) and Associated Gas Distributors.

With but one exception the applications for rehearing are restatements of positions of the parties previously advanced in briefs to the Administrative Law Judge and to the Commission on exceptions to the Initial Decision, presenting no new facts nor points of law not considered by the Commission. In addition to a restatement of its position previously taken, Transco seeks a partial stay of Opinion No. 655 in which the Commission would impose upon Natural an obligation to account for and repay Transco at the rate of 81,000 Mcf per day all gas taken from and after April 18, 1973, in the event the Commission's Opinion is reversed, remanded, or otherwise overturned upon appeal. Transco indicates that it would not expect to be able

to "keep" any volumes received from and after April 18, 1973, if the Commission's decision is ultimately upheld; and since Transco would be in no position to pay back volumes in such event, it is not requesting a complete stay. Natural opposes the granting of the partial stay sought by Transco on the grounds that it too would be in no position to repay volumes taken in the event Opinion No. 655 is reversed, and that the granting of such partial stay will mean that neither company can afford to take this gas pending ultimate determination of this proceeding.

We would consider the granting of a partial stay as requested by Transco only upon a showing of the likelihood of Transco's prevailing upon appeal.[1] Transco has made no such showing.

Upon review of Opinion No. 655 and the applications for rehearing, it appears that we may not have adequately disposed of the argument that *Michigan Consolidated Gas Co.* v. *F. P. C.*, 283 F. 2d 204 (CADC, 1960), *cert. denied*, 346 U. S. 913 (1960), sets the appropriate standard to be used in this case.

First, it must be observed that *Michigan Consolidated* was decided in the context of a request by a pipeline (Panhandle) that it be permitted to abandon sales to a distributor, with the released volumes then to be used by Panhandle in its own marketing program. The case dealt with gas supplies, which, whether marketed by the pipeline or the distributor, would be devoted to increased service. This was the very reason the Commission used a comparative space heating saturation test, a test appropriate only to projected load growth on one system at the expense of growth on another system. *Michigan Consolidated* dealt with a different kind of abandonment case than the one before us.

Secondly, neither the Commission, nor the Circuit Court, attempted to establish in *Michigan Consolidated* a single standard by which all abandonment cases are to be judged. The

1. *Virginia Petroleum Jobbers Assn.* v. *Federal Power Commission*, 259 F. 2d 921 (CADC, 1958).

Commission applied certain tests it then found to be appropriate, and the reviewing Court approved the use of those tests. The Court did not bind the Commission to use of the same criteria in judging future, dissimilar cases.

It must also be observed that the Commission in *Michigan Consolidated* determined that the present or future public convenience or necessity permitted the abandonment sought by Panhandle after applying three standards—not just comparative needs as we are urged to do here. On the basis of those standards, as they were used by the Commission and the Court in *Michigan Consolidated*, "greater advantage" has not been shown to either company in these proceedings and cannot be shown.

Finally, *Michigan Consolidated* did not involve an antecedent settlement which was approved by the Commission and which was inextricably interwoven into the abandonment problem. As stated in Opinion 655, we find it in the public interest to give effect to that settlement.

New York again urges that continuity of service is the very purpose for which Section 7(b) of the Natural Gas Act was promulgated. While we agree with this standard in principal, we cannot accept the parochial application urged by New York. Our responsibilities extend to the entire public interest not merely to a segment thereof. As indicated in Opinion No. 655:

> "In the instant proceeding, both pipelines are in short supply of natural gas and each is rendering less than full service to its customers. The loss of this gas to either pipeline will result in a diminution of its ability to continue even current levels of service."

We think the court in *Michigan Consolidated, supra,* at 214, correctly states the standard to be applied in abandonment cases:

> "An applicant for abandonment under § 7(b) of the Act has the burden of making the factual showing which will assure the Commission, charged with protecting the public interest, that that interest will in no way be disserved . . ."

Applicants have shown that the *overall* public interest would be disserved by denial of the abandonment sought in these proceedings. Transco and its supporting interveners have presented no unequivocal public necessity overriding that showing.

The Commission orders:

Applications for rehearing and partial stay are denied.

By the Commission.

KENNETH F. PLUMB,
Secretary.

(SEAL)

SUPREME COURT, U. S.

FILED

MAR 19 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1275

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, *et al.*,
Respondents

REPLY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents

REPLY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Respondent, Associated Gas Distributors (AGD) opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

QUESTION PRESENTED

Whether the Court of Appeals properly concluded that the Federal Power Commission may not ignore judicially sanctioned statutory tests in determining whether abandonment of previously certificated service to an interstate pipeline is required by the present or future public convenience and necessity.

STATEMENT

AGD respectfully suggests that the recitation of the background of this case by Petitioner Natural Gas Pipeline Company of America (Natural) fails to identify the specific findings of fact made by the Presiding Judge on the basis of the record evidence adduced in the October 1971 hearing (R. 1-1277). These findings are significant since they were not disturbed by the Commission's order.

After receiving the full evidentiary presentation by all parties, the Presiding Judge issued an Initial Decision which denied both the applications to abandon service to Transcontinental Gas Pipeline Corporation (Transco) pursuant to Section 7(b) of the Natural Gas Act and the contingent applications to initiate additional service to Natural. In reaching this result, the Presiding Judge resolved three fundamental questions. First, the Presiding Judge was confronted with the argument that abandonment of these sales to Transco was mandated by the terms of a 1958 settlement agreement between Natural and the producers from the LaGloria Field. As a corollary, it was claimed that denial of the producers' abandonment applications was in violation of that settlement agreement and with the Commission's order accepting it. The Presiding Judge held that the terms of that settlement agreement and the Commission's order in no way prejudged the outcome of the Commission's deliberations under Section 7(b) to determine whether the present or future public convenience or necessity would be served by the proposed abandonment. (J.A. 92).

He then turned to the question of appropriate tests to be used in determining whether abandonment was warranted in this particular case. His conclusion was that the proper statutory standard, as fully explained in the *Michigan Consolidated* case,[1] was that of the comparative needs of the public served by the two interstate pipelines, the real

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[1] *Michigan Consolidated Gas Company* v. *FPC*, 283 F.2d 204 (1960), *cert denied sub nom*, 364 U.S. 913 (1960).

parties and interests whose supplies were to be affected by the abandonment (J.A. 86). Finally, the Presiding Judge reviewed various factors related to each pipeline's present and foreseeable gas supply circumstances in order to determine the respective customers' needs. On the basis of this comparative evaluation of the evidence he concluded that:

> "Transco and its customers have a continuing need for the 81,000 Mcf/d of LaGloria gas not [sic] being sold them by the producers; that Transco's curtailment and possible effect on existing customers is more substantial than the effect of a decrease in purchases of primarily valley gas by Natural's customers; that Natural has failed to show that the adverse effect on it and its customers as compared to Transco and its customers permit abandonment by the producers of this sale to Transco . . ." (J.A. 101).

Contrary to Natural's assertion, the Presiding Judge did not conclude that the "relative needs were quite evenly balanced," but rather that, based on the record evidence, Transco and its customers had a greater need for the gas.

On March 21, 1973, the Commission reversed the Presiding Judge's decision holding that the 1958 settlement agreement was controlling on the question of whether the deliveries to Transco should be abandoned (J.A. 117). The Commission applied only a "sanctity of contract" analysis holding that the producers' contracts should be enforced in the absence of a showing of "unequivocal public necessity" (J.A. 118-119). The Commission's decision was completely devoid of any consideration of the need of Transco and its customers for the gas.

THE OPINION BELOW

The Court below determined that the Commission erred in focusing exclusively upon the contractual rights to the LaGloria Field gas supply. The Court concluded that reliance upon this single facet of the proceeding "seems to have so mesmerized the Commission that it abdicated its

statutory responsibility to guarantee that the overall public interest 'will in no way be disserved' by abandonment". Reliance upon Natural's contractual rights was an appropriate consideration for the Commission in reaching its determination; however, the statutory test for abandonment is much broader and many more factors must be taken into consideration. Thus, in its *per curiam* order, the Court remanded the proceeding so that the *Commission* could exercise its expertise and make findings based on record evidence on all considerations relevant to the proposed abandonment of service to Transco.

REASONS FOR DENYING THE WRIT

Natural has failed to state any justification for the issuance of a writ of certiorari in this proceeding. The circumstances under which a writ is available are limited. Even accepting Natural's rhetoric at face value, this case does not raise either a substantial federal question or a conflict of decisions between courts of appeal. Simply stated, there is no basis for Supreme Court review. The Court below determined that the critical question was the appropriate statutory standards to be used in determining whether the abandonment of service to an interstate pipeline is required by the present or future public convenience and necessity. The Court agreed with the Commission that contractual rights of the parties must be given consideration in resolving that question. However, the Court concluded that the Commission had ignored the abandonment criteria set forth in the *Michigan Consolidated* case (*supra*); in order to permit the Commission to apply those criteria to the particular facts of this case, the Court remanded the proceeding to the Commission for further hearings.

Natural correctly observes that "there is nothing in the public convenience and necessity provision of Section 7(b) of the Act requiring the Commission to give 'primary importance' to any one specific factor". In fact, just the opposite is true. Section 7(b) determinations require broad

considerations of the public interest and particularly the needs of the interstate pipeline whose service is to be abandoned. The Commission in fact focused only upon one specific factor to the exclusion of all others. Viewed in this perspective, the Court's decision is entirely consonant with *FCC* v. *Allentown Broadcasting Co.*, 349 U.S. 358 (1955).

A. THE COURT OF APPEALS CORRECTLY REQUIRED THE FPC TO APPLY JUDICIALLY SANCTIONED STATUTORY TESTS FOR ABANDONMENT OF SERVICE.

The FPC refused to consider this proceeding as an application to abandon service to an interstate pipeline; rather, the Commission relied exclusively upon the initiation of service from the LaGloria Field to Natural. The Court below correctly recognized that the service to Natural *cannot* be initiated unless an abandonment of service pursuant to Section 7(b) of the Natural Gas Act is first permitted. The threshold consideration to the Court, therefore, was the abandonment issue.

There can be no question that the Natural Gas Act imposes stringent standards in determining whether the abandonment of service is permitted by the present or future public convenience and necessity. The mere expiration of a contract's term does not justify an abandonment nor does it terminate the FPC's jurisdiction over the sale.[2] The fundamental purpose of the statutory abandonment provision is clearly to protect the consumer's right to a continuing source of gas supply.[3]

The court below observed that fundamental standards in determining whether abandonment is appropriate in the public interest must be considered by the Commission.

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[2] *Sunray Mid-Continent Oil Company* v. *FPC*, 364 U.S. 137 (1960).

[3] *Michigan Consolidated Gas Co.* v. *FPC*, *supra*, 283 F.2d at 214.

They recognized the two important principles set forth in the *Michigan Consolidated* case as:

> "(1) A pipeline which has obtained a certificate of public convenience and necessity to serve a particular market has an 'obligation, deeply imbedded in the law, to continue service,' and (2) the burden of proof is on the applicant for abandonment to show that the 'public convenience and necessity' permits abandonment, that is, that the public interest 'will in no way be disserved' by abandonment." (Slip op., p. 8)

The Commission's order failed to acknowledge, much less apply, those statutory criteria in determining whether abandonment was appropriate. The Court concluded that this myopic view was at odds with the provisions of the Natural Gas Act.

Natural's petition herein relies upon several cases which purport to suggest that the allocation of gas supplies is strictly a function vested in the Commission.[4] Unfortunately those cases involve the *commencement* of service pursuant to Section 7(c) of the Act and not the *abandonment* of service pursuant to Section 7(b) of the Act. Obviously different considerations pertain to the intiation of service than to the disruption of already certificated service. Consequently, reliance upon those Section 7(c) cases to support the thesis that the Court below improperly acted in an area reserved for Commission function is wholly inappropriate. The Court determined that the Section 7(b) abandonment criteria could not be ignored by the Commission; the Court did *not* substitute its conclusion for the Commission's expertise in Section 7(c) gas allocation proceedings.[5]

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[4] *Michigan Consolidated Gas Company* v. *FPC*, *203* F.2d 895 (3rd Cir, 1953); *FPC* v. *Transcontinental Gas Pipeline Corp.*, 365 U.S. 1 (1961).

[5] Natural's contention that the Court's decision will impede the Commission's exercise of its duties is equally erroneous. The Court simply stated that certain minimum tests must be applied to applications under Section 7(b).

Finally, the cornerstone of Natural's petition herein is that "the Commission-approved settlement agreement should be honored by [the Commission] absent circumstances of 'unequivocal public necessity' ". Such a contention was specifically rejected by the Court below. First, the Court concluded that the specific language of the Commission order approving the 1958 settlement *required* the filing of an abandonment application prior to switching deliveries to Natural.[6] In other words, the order was not dispositive of later-filed abandonment applications.

Second, the Court concluded that the burden of showing that abandonment should be granted is on the applicant, not on the receiving pipeline. Finally, the Court discussed the concept of "unequivocal public necessity" as discussed in this Court's *Permian* decision, noting that this Court was not in that case speaking in the context of statutory standards for abandonment. Going further, the Court below stated that "the public interest is jeopardized and 'unequivocal public necessity' is demonstrated whenever private contracts substantially impair the ability of a pipeline to maintain adequate levels of service to its customers." (Slip op., p. 10, fn 11). Thus, the Court considered and rejected each aspect of Natural's argument that Transco and its customers have the burden of proving that abandonment should not be granted. There is no conflict between this Court and the decision below.

B. THE ONLY FINDINGS OF FACT IN THE ENTIRE PROCEEDING DETERMINED THAT TRANSCO HAS A GREATER NEED FOR THE LA-GLORIA FIELD GAS.

The threshold precept upon which Natural's entire petition is predicated is that "substantial evidence showed the comparative need [of Natural and Transco] to be approximately equal". Such a statement is strange indeed in

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[6]Slip op., p. 9; *Argo Oil Corporation*, 20 FPC 208, 210 (1958).

light of the findings of fact made by the Presiding Judge and the failure of the Commission to disturb those findings. The fact is that the record evidence in this proceeding clearly shows that the comparative needs of the pipelines were *not* equal and that Transco and its customers had a greater need for the gas supply from the LaGloria Field. The Court below determined that the Commission must consider the comparative needs of the pipelines in reaching its decision. The Court did not preclude the Commission from giving due consideration to the contractual rights of the parties, nor did it preclude the Commission from giving due consideration to the more diligent pipeline; however, complete exclusion of the comparative needs considerations by the Commission is directly counter to the statutory standards established in the Natural Gas Act and judicial precedent.

The Presiding Judge made a careful study of the facts relating to the needs of each pipeline. He studied the existing reserves and reserve life indices, the present and proposed curtailments, the reordering of priorities and end use, and the impact upon the consumers on each pipeline system. Having done so, the Presiding Judge concluded that "Natural has failed to prove that the present or future public convenience or necessity permit abandonment" (J.A. 96). In fact, the Presiding Judge concluded that Natural's supply deficiency was inflated and did not reflect actual curtailments in previously rendered levels of service. Natural's "shortage" is its inability to meet its customers' request for *higher* load factor service in the warmer months. The gas would allow incremental service to Natural's customers whereas Transco's customers are "experiencing an actual curtailment of gas" below prior levels of delivery (J.A. 96). These are findings of fact which the Commission failed to disturb or modify in its order.

Natural itself agreed in brief before the Court below that the Commission did not reach the question of the comparative needs of the two pipelines. According to Natural, the Commission did not reach the issue of "*which pipeline, in fact, had greater need*" for the LaGloria Field

gas (Initial Brief, p. 11, 14, 37, 38). In fact, Northern Illinois Gas Company, the largest distribution company-purchaser from Natural frankly stated in its brief to the Court below that "... *the Commission did not differ with the Administrative Law Judge on his findings of fact*" and that "to overrule the Commission on its finding of fact would be erroneous and futile, since *it made no independent findings of fact*". (Court of Appeals Brief, p. 12, emphasis supplied). Natural's rhetoric at this point seems to adopt a different note. Perhaps in light of Natural's and its customers' position in brief, the Court below was not convinced that the Commission even considered the comparative needs of the pipelines in reaching its decision.

Without a relatively equal need, Natural has no basis for arguing that FPC reliance solely on contracts and settlements should prevail "all other things being equal." The comparative needs of the pipelines were *not* equal and the FPC order did not find that they were. In the *Allentown* case *supra*, cited by Natural, the Federal Communications Commission (FCC) *made findings* concerning the need for radio service of two respective communities. The FCC found that one community had a greater need for the station. The Court of Appeals reversed, concluding that there was no substantial evidence to support the conclusion that the ability of the applicants to serve their respective communities was equal. This Court reversed, *holding that the respective needs of the two communities was an appropriate consideration.*

In the case at bar, the Court below determined that certain statutory tests for abandonment of service had been ignored by the FPC and that *the comparative needs of the areas served by the two pipelines should have been considered.* The FPC did not disturb the Presiding Judge's finding that Transco had a greater need for the gas even though it gave no weight to such finding. The Court below did not invade the FPC's discretionary province but merely directed that the comparative need factor be considered. In short, the decision below is fully consistent with this Court's *Allentown* decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Natural's petition for a writ of certiorari be denied.

Respectfully submitted,

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March 19, 1974

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MAR 20 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1275

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner,

vs.

TRANSCONTINENTAL GAS PIPELINE CORPORATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1275

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner,

vs.

TRANSCONTINENTAL GAS PIPELINE CORPORATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

QUESTION PRESENTED

Whether the Court of Appeals correctly reversed a Commission decision permitting producers of natural gas to abandon service to one pipeline so that they could sell their gas to another, which failed to consider the comparative needs of the two pipelines for such service or the Examiner's findings that the existing pipeline had a greater need for the gas.

STATUTE INVOLVED

Section 7(b) of the Natural Gas Act, 52 Stat. 834, 15 U.S.C. § 717f(b), establishing the procedural and substantive prerequisites to any abandonment of natural gas service, is set out at page 2 of the Petition.

STATEMENT

The petition in this case seeks review of an opinion of the Court of Appeals for the District of Columbia Circuit reversing a decision of the Federal Power Commission which authorized a number of producers of natural gas to abandon service to Transcontinental Gas Pipe Line Corporation (Transco) in order to serve petitioner, Natural Gas Pipeline of America (Natural). The primary basis for the Court determination was that, in concluding that public convenience or necessity permitted the abandonment of service to Transco within the standards established by Section 7(b) of the Natural Gas Act, the Commission had improperly failed to consider the comparative needs of the two pipelines and their customers for continuing service.

The Public Service Commission of the State of New York (New York) is a regulatory body duly established by the laws of the State of New York having cognizance over the operations of the gas distribution companies doing business in the State. As such it is vitally interested in proceedings of the Federal Power Commission relating to the gas supplies of pipelines serving New York customers, one of which is Transco. Accordingly, New York intervened in the Commission proceeding on the applications seeking abandonment of existing service to Transco, and participated actively both at the Commission and in the lower court in opposition to any such abandonment. The proposed abandonment was of particular concern to New York since Transco is already curtailing firm service

to its customers, including those in New York State, and grant of the abandonment authorized here would have reduced Transco gas supply by an additional 81,000 Mcf per day.

The present proceeding has a rather long administrative history. In 1947, contracts were entered into by the producers in the La Gloria field of Texas and Transco which, as amended in 1949 prior to initial delivery, provided for the sale of 81,000 Mcf per day of gas to Transco over a period of 20 years at prices specified in the contract. (R. 3446-3483)[1] Any surplus gas in addition to this amount was to be available for sale to other parties, and on January 25, 1950 the producers entered into a contract with Natural to sell it up to 85,000 Mcf per day, subject to the producer's prior obligation to Transco and to their right to use gas for their own purposes in the field. (R 1301-1392)

A dispute subsequently ensued between the producers and Natural as to the amount of gas to which Natural was entitled. When this Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, concluded that the producers sales were subject to Commission regulation under the Natural Gas Act, the dispute was brought to the Commission with the producers attempting to invoke a clause in their contract with Natural which permitted them to terminate service if it became subject to the Federal Power Commission's jurisdiction, and Natural opposing such action and arguing that the producers were not delivering all of the gas due it under the contract. In *Argo Oil Corp.*, 15 F.P.C. 601, 622 (1956), the Commission decided that the producers could not terminate the contract with Natural without first invoking the abandon-

[1] Citations in this opposition to R. —— are to the original record before the Commission; to J.A. —— to the printed Joint Appendix, copies of which have been lodged with the Court; and to Pet. A —— to the Appendix to the petition.

ment provisions of Section 7(b) of the Natural Gas Act, but reserved for later hearing and argument the question of whether the producers were in fact delivering to Natural the volumes it claimed.

The Commission's decision was appealed by the producers. While this appeal was pending, the producers and Natural agreed upon a settlement of their differences. Under this 1958 settlement agreement, to which Transco was not a party, the producers agreed to withdraw their appeals, the amount of gas to be provided to Natural under its existing contract was fixed, and Natural was given the contractual right to all additional gas which became available for sale in the field, including the right to purchase the gas being sold to Transco when the producers' contracts with Transco expired on April 1, 1971.[2] The settlement agreement expressly recognized, however, that before Natural could succeed to the services then being provided to Transco it would be necessary for the producers to secure abandonment authority from the Federal Power Commission (R. 1434-35).

By Order of August 15, 1958 in *Argo Oil Corporation, et al.*, 20 F.P.C. 208 (1958), the Commission approved the settlement agreement between the producers and Natural as a proper resolution of their differences. The Commission's Order makes clear, however, that its approval was not to "be construed as a waiver of the requirements of Sections 4 or 7 of the Natural Gas Act, or of the Commission's Regulations thereunder, and is without prejudice to any findings or orders which have been or may hereafter be issued by the Commission in any proceeding now pending or hereafter instituted by or against any of the parties to these proceedings" (20 F.P.C. at 220).

---

[2] As part of the settlement, Natural also agreed to pay the producers an increase of some 4 cents per Mcf for gas delivered during the period from December 2, 1966 to December 2, 1971.

The present proceedings were instituted by applications filed by the producers in early 1971 to abandon their sales to Transco so that they could sell the gas in issue to Natural. The matter was set for hearing by Commission Order of August 23, 1971 (J.A. 45-54) and hearings held between October 5 and 19 of that year. At the hearings, neither the producers nor Natural, which intervened in support of the abandonment applications, introduced any direct evidence as to the relative needs of the two pipelines for the gas service in issue. However, when New York pointed out at the opening of the hearing that such a comparison appeared to be essential under the standards of Section 7(b) of the Natural Gas Act and the decision in *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 283 F.2d 204 (D.C. Cir., 1960) certiorari denied, 364 U.S. 713, evidence on this question was introduced by the various parties.

On June 2, 1972, the Presiding Examiner issued an Initial Decision holding that the applicants had failed to sustain their statutory burden of showing that the present or future public convenience or necessity permitted the abandonment of the sale to Transco, and proposing therefor to deny the abandonment applications. (J.A. 55-105) He determined that, contrary to the arguments of the applicants and Natural, the Commission's 1958 order in the *Argo* case, *supra* approving the producer-Natural settlement did not, and could not have determined the outcome of the 1971 abandonment proceeding. And, he concluded after detailed anaylsis of the comparative needs of the parties (J.A. 93-101) that:

> "On the basis of all of the evidence of record, the Examiner concludes that Transco and its customers have a continuing need for the 81,000 Mcf/d of La Gloria gas now being sold them by the producers; that Transco's curtailment and possible effect on existing customers is more substantial than the effect

of a decrease in purchases of primarily valley gas by Natural's customers; that Natural has failed to show that the adverse effect on it and its customers permit abandonment by the producers of this sale to Transco; and that the applications seeking to abandon such sales must be denied." (J.A. 101)

The Commission in its Opinion No. 655, issued on March 21, 1973 (Pet. A. 18-30) reversed the Examiner and authorized the abandonment. Stating that the Examiner had improperly focused on the abandonment issue to the exclusion of the producers' applications to provide service to Natural (Pet. A 20), the Commission held that the 1958 contract between the producers and Natural, which it had approved as a settlement of the controversy between those parties, could not be fully effectuated unless it now authorized the abandonment requests (Pet A. 25), and that in the absence of a showing of "unequivocal public necessity" by Transco, it would be contrary to the public interest to abrogate this contract to prolong service to Transco (Pet. A. 26-27). Ignoring the Examiner's findings that Transco had a greater need for the gas than Natural, it concluded that no showing of "unequivocal public necessity" had been made since "both pipelines are in short supply of natural gas and each is rendering less than full service to its customers. The loss of this gas to another pipeline will result in a diminution of its ability to continue even current levels of service" (Pet. A. 27).

The court below unanimously reversed the Commission (Pet. A 1-11). Finding that "at bottom, the Commission's decision stands for the simple proposition that where all parties need contested gas supplies the party having a contractual right to such gas will prevail" (Pet. A. 8), the Court concluded that this formulation "fails to perceive that the fact that all need gas does not mean that all need it equally" (*Ibid.*). Thus, while the Court indicated that the Commission could give "significant

weight" to Natural's contractual rights arising out of the 1958 settlement (Pet. A. 11), it held that under the controlling standards of Section 7(b) of the Natural Gas Act, "primary importance must be given to a broadly conceived comparison of the needs of the two natural gas systems and the public markets they serve" (Pet. A. 10-A11). It also held that the Commission in the remanded proceeding should consider the impact of any abandonment approval upon the environment. (Pet. A. 11).

ARGUMENT

The Court of Appeals correctly decided the question presented by the petitioner, its opinion is not in conflict with any decision of this Court or the other circuits, and the issue presented for this Court's review does not raise questions of importance in the operation of the Natural Gas Act. The petition for a writ of certiorari must, therefore, be summarily denied.

1. The Presiding Examiner who heard the evidence in this case found that the existing pipeline customer Transco had a greater need for the gas than another pipeline, Natural, to whom the producers had agreed to sell the gas upon expiration of their contracts with Transco (J.A. 101). The Commission, without disturbing this finding, held that, particularly since the producers' agreement with Natural had been incorporated into a Commission approved settlement of a dispute between the producers and Natural, it would be contrary to the public interest to deny their abandonment applications filed some thirteen years later unless the pipeline being abandoned, together with its customers or consumer supporters, could demonstrate "an equivocal public necessity" for upsetting the contractual rights of the producers and Natural (Pet. A. 26-27). This showing, it concluded, had not been accomplished because 'both pipelines were in short supply

of natural gas and each is rendering less than full service to its customers." (Pet. A. 27).

The Court of Appeals correctly held that this Commission formulation of its responsibilities under Section 7(b) of the Natural Gas Act, made private contract rather than public interest the touchstone of whether gas service should be abandoned, and effectively shifted the burden of proof from those seeking to abandon established service to those attempting to maintain it. In its view, while "significant weight" could be accorded to the contract rights that resulted from the 1958 Commission approved settlement agreement (Pet. A. 11), "primary importance must be given to a broadly conceived comparison of the needs of the two natural systems and the public markets they serve" (Pet A. 10-11). See *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 283 F.2d 204 (D.C. Cir., 1960) certiorari denied, 364 U.S. 913. In New York's opinion, this formulation could lead a reluctant Commission to once again ignore the statutory intent of protecting existing service from disruption and to give paramouncy to private contract over the public interest.[3] Specifically, we believe that if, contrary to the petitioner's suggestion here,[4] the Commission were to

[3] There will inevitably be a contract between the seller and a potential buyer of gas before the former seeks to have the Commission approve a shift in service from an existing buyer who wishes to retain the service. The Commission's view, therefore, appears to encourage the very type of "pirating" of gas supplies it states it will not countenance (Pet. A. 27). Apparently contractual theft of gas service becomes "the orderly functioning of the interstate pipeline industry" (*ibid.*), if the agreement therefor is made sufficiently in advance of the date it is to be effectuated.

[4] The Examiner, far from finding that the needs of the two systems were "approximately equal," concluded for reasons he detailed at length (J.A. 93-101) that the effect of the curtailment on Transco's existing customers of any abandonment of the 81,000 Mcf/d of La Gloria gas was "more substantial" than the loss of additional valley gas to Natural's customers, and that Natural had "failed to show" that the adverse effect on it and its customers as

find that the comparative needs of the existing and prospective purchaser of the gas were "approximately equal", the Act contemplates that the existing service should be maintained. But in any event the lower court's conclusion that primary importance must be afforded to a broadly conceived comparison of the needs of the two systems is clearly required by the Natural Gas Act and controlling precedent.

2. The opinion below is not in conflict with this Court's decision in the *Permian Basin Area Rate Cases*, 390 U.S. 747 or *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358. As the Court of Appeals made clear (Pet. A 9, n. 11), the language in this Court's *Permian Basin* opinion from which the Commission derived its "unequivocal public necessity" standard, relates to the completely different issue of the circumstances in which the Commission under the Natural Gas Act may permit a producer or pipeline to abrogate its existing contract with a purchaser to raise its rates above the maximum specified therein. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332; *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348; *United Gas Pipe Line Co.* v. *Memphis Light Gas & Water Division*, 358 U.S. 103. It would be anamolous indeed if these holdings that the Act was intended to protect consumers by superimposing protective rate regulation upon private contracts were to be invoked with respect to the abandonment provisions of Section 7(b) of the Act intended to provide consumer protection against loss of service upon which they have been relying by subordinating private contractual rights "to an obligation, deeply imbedded in the law, to continuous service", *Mich-*

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compared to Transco and its customers permit abandonment (J.A. 101). The Commission did not disturb these findings, since in its view, any comparison was unnecessary where both pipelines were in short supply and rendering less than full service to their customers (Pet. A. 27).

igan Consolidated Gas Co. v. *Federal Power Commission, supra*, 283 F.2d at 214. See also *Sunray Midcontinent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 155-156.

The *Allentown* case is even less apposite. There the Court held that the provisions of Section 310(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(b), required that primary attention be given to the equitable allocation of radio stations among the several communities. The FCC could, therefore, conclude that the determinative factor in choosing between mutual exclusive applicants *for new service* was that one would provide a first competing service to its community, without considering which of the two could best serve the needs of their respective communities. The only possible analogy with the Natural Gas Act would be an argument that, where there are two pipelines competing for a *new* supply of gas, the one with the contract for the gas with the producer should be favored, irrespective of their comparative needs for the gas. Even in such circumstances the analogy is far from perfect since the Natural Gas Act does not have any provision analogous to Section 310(b) of the Communications Act providing that contractual provisions are to be prevail in determining whether a particular sale is required by the public convenience and necessity.

3. The factual situation presented by the present case is a "sport" which to the best of our knowledge has not previously arisen during the entire history of regulation under the Natural Gas Act. There has been no general industry practice whereby distributor or pipelines seek to buy away gas under contract to a competitor as of the date the contract expires. The decision below merely reaffirms the basic criteria for considering abandonment applications where the seller's aim is to shift service to a new purchaser, established thirteen years ago in the

Michigan Consolidated case, *supra*, and not subsequently questioned in any Commission proceeding prior to the present one. While affirmance of the Commission's position below could have had a significant impact upon the future operation of the natural gas industry by encouraging canabilism in a period of scarcity, its rejection clearly does not present questions as to the Commission's regulatory authority under the Natural Gas Act calling for the plenary review by this Court.

CONCLUSION

For the reasons set forth above, the opinion below is correct and the petition for a writ of certiorari should be denied.

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SUPREME COURT, U. S.
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RODAK, J

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENT TRANSCONTINENTAL GAS PIPE LINE CORPORATION

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March 22, 1974

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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BRIEF IN OPPOSITION FOR RESPONDENT TRANSCONTINENTAL GAS PIPE LINE CORPORATION

Transcontinental Gas Pipe Line Corporation (Transco), a respondent herein and a petitioner in the court below, opposes the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-described proceeding.

QUESTION PRESENTED

In a case where the Federal Power Commission relied almost exclusively on the contract rights of the private parties, the question presented is whether, under the abandonment provision (Section 7(b)) of the Natural Gas Act, the Court of Appeals was correct in requiring the Federal Power Commission to consider, evaluate and balance all relevant public interest factors.

COUNTERSTATEMENT OF THE CASE

This case involves a factual situation, which is *sui generis* in the history of the natural gas pipeline industry and Federal Power Commission (FPC or Commission) regulation of that industry, where one pipeline company, Natural Gas Pipeline Company of America (Natural), contracted with producers thirteen years in advance to take away natural gas then being sold to another pipeline company, Transco, at the end of the primary term of Transco's contract with the same producers.

The first contract for the sale of gas to an interstate pipeline from the La Gloria Field, in Texas, was executed in 1947 between the La Gloria producers and Transco. As amended in 1949, prior to initial delivery, this contract provided for the sale of up to 81,000 Mcf [1] per day to Transco for the standard period of twenty (20) years from the date of first delivery. Article XIV of the contract provided for the sale of "surplus gas" to others, subject to a specific reservation of Transco's prior right to purchase 81,000 Mcf per day (R. 126, 127).[2]

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[1] An Mcf denotes one thousand cubic feet of gas.

[2] Reference "R." is to the record certified to the court below.

In 1950, Natural's predecessor (Texas Illinois Natural Gas Pipeline Company) entered into a contract with the La Gloria producers to purchase the surplus gas. Thereafter, upon the issuance of the landmark *Phillips* decision by this Court,[3] which held producers to be subject to the Natural Gas Act, the La Gloria producers attempted to invoke an "escape clause" in their contract with Natural and terminate deliveries to Natural. Natural counterattacked that the producers were not delivering the full quantities of gas to which Natural was entitled. In order to resolve these disputes, Natural and the producers entered into a new contract in 1958, which they termed a "settlement agreement," under which, *inter alia,* Natural's stated contract quantity was reduced in line with the surplus volumes of gas realistically available to it, Natural agreed to increase the price payable to the producers, and the producers agreed to sell to Natural the 81,000 Mcf then being sold to Transco after Transco's primary term expired in 1971. The agreement specifically recognized that the producers would later have to seek abandonment authority from the FPC (but would not have to appeal an adverse decision) (R. 1434, 1435); and, in approving the new arrangement, the Commission specifically provided that it was not waiving the requirements of Section 7 of the Act and that the authorization was without prejudice to any future proceedings involving the parties. 20 FPC 208, at 210. Transco took no part in the discussions between the producers and Natural, and Transco was not a party to the new agreement (J.A. 1, 2).[4] Because its contract

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[3] *Phillips Petroleum Co.* v. *State of Wisconsin,* 347 U.S. 672, 74 S.Ct. 794 (1954).

[4] Reference "J.A." is to the Joint Appendix in the court below.

rights were not affected and no abandonment against it was then being sought or granted, Transco did not oppose authorization for the new arrangement.

This, then, is the background of the abandonment applications to cease deliveries to Transco which were filed by the La Gloria producers in early 1971. Approximately seven months after the applications were filed, the Commission issued its order setting the matter for hearing, and at the same time, apparently recognizing that the case would be hotly contested, attempted to avoid a meaningful record on relative needs by asserting *ex parte* that the two competing pipelines need "additional as well as existing gas supplies" and advising that "[t]he parties . . . need not make an issue of the question of need for gas supplies by either pipeline company or its customers" (J.A. 49).

This attempt by the Commission to avoid evidence on and consideration of public interest factors failed, at least at the hearing level. In the face of all prior Commission and Court pronouncements regarding the scope of statutory responsibility in abandonment proceedings, the Presiding Examiner permitted a limited record to be made on the issue of relative needs and certain other public interest factors. After hearings held in October, 1971, the Presiding Examiner issued his decision denying the abandonment. As the court below correctly stated:

> "Based upon an extensive and careful review of the evidence, the Presiding Examiner found, *inter alia,* that Transco had greater need for the La Gloria field gas than Natural."[5]

---

[5] For the convenience of the Court, the Examiner's findings on comparative needs are excerpted from the record and set forth in Appendix A hereto.

The Commission, however, reversed. Without disturbing or in any way disagreeing with the findings of the Examiner, the Commission held that "comparison of pipeline needs in times of shortage is a prodigious undertaking" and that, in any event, the standard was defective (J.A. 117). Without explaining the defects in the standard, the Commission proceeded to formulate a new standard under which private contract rights would be given controlling weight absent "compelling proof" on the part of the opponents of abandonment of "unequivocal public necessity" which would require denial of the abandonment.

Upon appeal, the court below reversed and remanded the case to the Commission. The court, while recognizing contract rights as one factor in the balancing process, held that:

> "Rigid deferral to contractual arrangements without a searching inquiry into other factors relevant to the public interest as required by Section 7(b) simply is an inadequate means to assure vindication of the transcendent interests of the public."

The court then listed certain *public interest* factors which had been raised by the parties, including comparative needs of the two pipeline systems, the environmental effects of the decision,[6] the economic effect on the pipelines and their consumers, the presumption in favor of continued service and the relative diligence of the respective pipelines in providing for adequate supplies,[7] which the court contemplated would be among

[6] In its brief to the court below, the Commission conceded that the procedures mandated by the National Environmental Policy Act of 1969 (NEPA) had not been followed by the Commission.

[7] This factor had been urged by Natural and its supporters but, like the others, was ignored by the Commission.

the subjects of a "searching and comprehensive inquiry . . . into all factors relevant to determining the overall public interest . . ." on remand. (Pet., p. A10-11).[8]

The Commission itself has chosen not to seek further review of the Court of Appeals' decision, and has indicated by its order of February 22, 1974 that it intends to carry out the mandate of that court for further proceedings. Natural, one of the intervenors supporting the Commission in the court below, alone has petitioned for a writ of certiorari.

REASONS FOR DENYING THE WRIT

As shown below, the reasons for denying the writ are twofold: (1) the decision below is clearly correct, and (2) there is no substantial question warranting this Court's attention.

I

THE DECISION BELOW IS CLEARLY CORRECT

Natural's principal argument in support of certiorari is that the Court of Appeals improperly "substituted its judgment for that of the Commission," and thereby exceeded the permissible bounds of judicial review of administrative agency action. The factual premise which underlies Natural's argument is that the comparative needs of the two rival pipeline systems were viewed by the Commission as "approximately equal" or "indecisive." Assuming the validity of that premise, Natural argues that the Commission was justified in ignoring comparative needs and relying instead on other factors, principally private contracts, for its decision.

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[8] Reference "Pet." is to the petition for writ of certiorari.

The Court of Appeals, however, did *not* substitute its judgment for that of the Commission on any factual issue. What the court below did was simply rule that the Commission must follow the statutory mandate of evaluating the "public convenience or necessity" and could not, therefore, as a matter of law, ignore relevant public interest factors in reaching its determination on abandonment of service. The court was clearly correct in its conclusion that the statutory public interest standard called for a broadly based inquiry, which was not satisfied by merely deferring, as the Commission did, to private contractual arrangements. The court pointed to a number of public interest factors, including comparative needs, that were ignored by the Commission but should be considered in the remanded proceedings.

Moreover, Natural's factual premise of "approximately equal" needs is wholly false. The Presiding Examiner, based on the record evidence, found that Transco had greater need than Natural for the contested La Gloria supplies (see Appendix A), and the Commission, while taking no issue with such factual findings, simply rejected that factor in deciding the case.

A. The Court of Appeals Did Not Exceed the Scope of Judicial Review by Requiring the Commission To Consider Public Interest Factors Which Had Been Ignored.

The Court of Appeals vacated and remanded this case because the Commission, in placing almost exclusive reliance on private contracts for its approval of abandonment, failed to consider adequately and fully a number of other public interest factors which are clearly relevant in the context of this case.

Natural argues that the Court of Appeals exceeded its judicial review powers by requiring the Commission to consider comparative needs as a public interest standard of primary importance in the remanded proceedings (Pet., pp. 7-9). Natural concedes that comparative needs "is an element in this case in determining the public convenience and necessity" (Pet., p. 9), but its differences with the court below appear to be twofold: (1) that the court below was mandating consideration of comparative needs to the exclusion of other factors, and (2) that the Commission actually considered comparative needs and recognized such needs to be "about equal."

Natural is wrong on both counts. First, the whole thrust of the decision below is to direct the Commission's attention to any and all relevant public interest factors and not to be mesmerized by private contract considerations as it had been in Opinion No. 655. Clearly, the court below did not countenance reliance on any one factor to the exclusion of others, and its decision cannot fairly be so interpreted. While the court below did consider relative needs to be a prime factor, the court made no attempt to tell the Commission how much weight to place on this factor since its importance in the balancing process would require, in the first instance, that the Commission address the issue and determine initially the degree of need by the respective competitors. Moreover, the very case principally relied upon by Natural, *FCC* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 75 S.Ct. 855 (1955) demonstrates the fundamental proposition that relative need is always a key issue in deciding competitive applications under public interest statutes. Indeed, the Federal Power Commission itself previously recognized that basic proposition in *Michigan Consoli-*

dated Gas Co. v. *FPC,* 283 F.2d 204 (CADC, 1960), *cert. denied,* 364 U.S. 913, 81 S.Ct. 276 (1960).

In requiring a broader examination of the public interest than was evidenced by the Commission's reliance in Opinion No. 655 on private contractual arrangements, the Court of Appeals was clearly on firm ground. The court reiterated the principle stated in *Michigan Consolidated* that:

> "Where, as here, a regulatory agency has ignored factors which are relevant to the public interest, the scope of judicial review is sufficiently broad to order their consideration. These limits are not to be confused with the narrower ones governing review of an agency's conclusions reached upon proper consideration of the relevant factors." 283 F.2d at 226.

This principle finds ample support in decisions of this Court. For example, in *Atlantic Refining Co.* v. *Public Service Commission of New York,* ("CATCO"), 360 U.S. 378, 79 S.Ct. 1246 (1959), this Court stated that "§7(e) requires the Commission to evaluate all factors bearing on the public interest." 360 U.S. at 391, 79 S.Ct. at 1255. Clearly, Section 7(b) here involved requires no less. The Court went on to say that, based on the facts there presented, price was a consideration of "prime importance." The Supreme Court reiterated this principle in *FPC* v. *Transcontinental Gas Pipe Line Corporation,* 365 U.S. 1, 81 S.Ct. 435 (1965), stating that "the term 'public convenience and necessity' connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination." 365 U.S. at 23, 81 S.Ct. at 447. In *Transcontinental,* the Court also cited with approval *City of Pittsburgh* v. *FPC,* 237 F.2d 741 (CADC, 1956), as an example of "the

cases which have held that it was error for the Commission to refuse to consider certain factors within its power of notice." *Ibid,* at n. 19. Thus, there is a clear line of authority in the decisions of this Court for the action of the court below in vacating and remanding the case for consideration of relevant public interest factors which had erroneously been ignored.

Turning to the factors enumerated by the court below for further consideration on remand, there can be no question that they are relevant to the public interest determination; indeed, Natural does not contend otherwise. Clearly, if the comparative needs standard was relevant in the context of the *Michigan Consolidated* case involving a dispute as to which of two competitive markets would be authorized to receive *additional* gas service, it is *a fortiori* relevant in an abandonment application where, as here, Transco's existing customers would suffer a deprivation of *existing* service if abandonment were approved. Likewise, the other factors listed by the court, namely, environmental and economic impacts, the presumption in favor of continued service, the relative diligence of the respective pipelines in providing for adequate gas supplies (a factor urged by Natural), and the weight to be accorded to private contracts and settlements are also relevant to the public interest determination.

Natural also contends that the Court of Appeals erroneously rejected the principle that contracts should be honored by a regulatory agency absent circumstances of "unequivocal public necessity," and, therefore, its decision is in conflict with this Court's decision in *Permian Basin Area Rate Cases,* 390 U.S. 747, 88 S.Ct. 1344 (1968). Natural cites *Permian* as though it announced a new legal doctrine applicable to

proceedings under the Natural Gas Act. However, as shown by the opinion, 390 U.S. at 779, 822, 88 S.Ct. at 1366, 1389, *Permian* merely applied to independent producers the proposition which the Court had long ago announced for pipelines in proceedings under Sections 4 and 5 of the Act in *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 76 S.Ct. 373 (1956). That doctrine is that private parties will not be relieved of improvident bargains in seeking rate relief under Sections 4 and 5 of the Act absent a showing of "unequivocal public necessity." However, this Court has held that such doctrine is inapplicable to proceedings under Section 7(b) of the Act. In *Sunray Mid-Continent Oil Co.* v. *FPC*, 364 U.S. 137, 80 S.Ct. 1392 (1960), this Court flatly rejected the argument that the continuing obligation to provide service under the statutory scheme of Section 7(b) was in any way diminished or circumscribed by private contractual provisions. Referring to the doctrine of *Mobile* regarding the integrity of private contracts *as between the parties thereto,* this Court ruled in *Sunray* that the *Mobile* doctrine was "simply beside the point" in a Section 7(b) abandonment situation. 364 U.S. at 155, 80 S.Ct. at 1403. It would seem to belabor the obvious that a contrary holding would essentially reduce the Commission's function to that of an arbiter of contract rights and obligations, a function which would not require the creation of an administrative agency. In this regard, the Commission itself had always heretofore held that contract rights are *not* dispositive of the public interest in abandonment proceedings.[9]

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[9] See, e.g., *Trunkline Gas Co.*, 31 FPC 1118, 1120, 1121 (1964); *Harper Oil Co.*, 23 FPC 2, 3 (1960); *Cabot Gas Corporation*, 3 FPC 582 (1943); and *United Gas Pipe Line Co.*, 3 FPC 3, 9 (1942).

In summary, decisions of this Court amply demonstrate the correctness of the Court of Appeals' decision requiring the Commission to consider *all* relevant public interest factors, as well as its subsidiary ruling that private contracts are not to be accorded dispositive weight in abandonment proceedings. Accordingly, the decision of the court below is clearly correct.

B. Natural's Assertion That the Commission "Recognized" That the Comparative Needs of the Two Rival Pipeline Systems Were "About Equal" Is Untenable.

As noted above, Natural concedes that comparative needs is an element of the public interest in this case. Natural, however, would have this Court believe that the Commission actually considered the issue adequately and fully. Natural asserts that the Commission "was fully aware of the great need of both pipelines for the gas supply in question, a need that was about equal" (Pet., p. 9), and therefore recognized that "comparative need was not a controlling element" (Pet., p. 10). Natural's assertion is without merit.

The Commission's own statements concerning its approach to this proceeding belie Natural's assertion that the Commission made *any* determination of comparative need, much less one of "approximately equal" need. In view of the facts that the Commission (1) first attempted to dissuade the parties from making a record on comparative needs in its *ex parte* order setting the matter for hearing (J.A. 49), and (2) thereafter in its decision assailed the comparative needs standard as a "prodigious undertaking" replete with unspecified "substantive defects"[10] (J.A. 117), it is

[10] Of course, it is one thing to allege "substantive defects" in the comparative needs standard, but quite another to provide an explanation to substantiate the sweeping allegation. The Commission has never done so.

utterly astonishing that Natural now claims that the Commission considered the question and somehow "recognized" that the comparative needs of the two pipelines were "about equal."

The Commission was satisfied that both pipelines had a need for additional gas supplies and was content to let the matter lay without further inquiry (see J.A. 49 and 118, ¶ 31). In sharp contrast to the broad brush conclusion of the Commission to the effect that everybody needs gas during this period of gas shortage is the careful analysis of the evidence and the specific finding of the Presiding Examiner that "while Transco's customers are experiencing an *actual curtailment* of gas, Natural's customers are *unable to add additional load* within contract demand" (J.A. 96, Appendix A, p. 1a, emphasis supplied). Thus, Transco's existing customers were being cut back from the level of deliveries which they had previously experienced, whereas Natural's customers were only being denied *new* annual volumes within the maximum daily quantities specified in their contracts with Natural. This critical difference in the comparative needs of the customers of the two rival pipeline systems was the basis for the Examiner's conclusion that Transco had greater need than Natural for the La Gloria supplies (J.A. 101, see Appendix A). Natural's contrary assertion (Pet., p. 4) that the Examiner "found the relative needs were quite evenly balanced" is a blatant misrepresentation of the Examiner's express findings.

Surely where the Presiding Examiner heard the evidence, analyzed it and made specific findings and determinations, the Commission has an obligation to explain and articulate its differences with the Ex-

aminer, if indeed it has any. The Commission did not disturb or overturn the Examiner's findings on relative need, but simply rejected comparative needs as a public interest standard in this case. There can be no doubt that the Commission made no express "finding" to the effect that the two pipelines had equal need, nor did the Commission, as Natural would now have it, somehow recognize *sub silentio* that the needs were "about equal."

It is also pertinent to note that Natural is now advancing a position to this Court which is diametrically at odds with its earlier statement to the court below. In its brief to the Court of Appeals, Natural stated that "[a]pplying the proper test, the *Commission was not required to, and did not, reach the question of which pipeline had greater need*" (Natural's Brief, p. 38, emphasis supplied). The other intervenors in support of the Commission expressed the same view. Understandably, Natural offers no explanation as to how the Commission could have determined that needs were "about equal" when it never reached the question. Thus, for the above reasons, Natural's factual predicate of "approximately equal" needs is conclusively negated.

Natural's erroneous factual predicate attempts to lay the foundation for its reliance on *FCC* v. *Allentown Broadcasting Co.*, 349 U.S. 358, 75 S.Ct. 855 (1955), for the proposition that no single factor should be viewed as determinative of the public interest, and that when a factor such as comparative needs, however important it may be, does not really distinguish two applicants, the agency may turn to factors which might not otherwise be decisive (Pet., pp. 10-11).

This Court's decision in *Allentown,* however, reveals no error in the decision of the Court of Appeals in the instant case. The short answer to Natural's reliance on *Allentown* is that the Commission here never reached a determination of the comparative needs issue, as we have shown above. In any event, this Court's decision in *Allentown* took note of the fact that the Federal Communications Commission "first determines which community has the greater need for additional services . . ." 349 U.S. at 361, 75 S.Ct. at 858. It then concluded, contrary to the lower court, that substantial evidence supported the FCC's determination that Easton had greater need because Easton did not have the competitive broadcast service which already existed in Allentown. 349 U.S. at 363, 75 S.Ct. at 858. Thus, the *Allentown* decision, far from undermining the decision below, confirms the error in the FPC's refusal to consider comparative needs of Transco and Natural as an important public interest factor in the instant case.

II

THE DECISION BELOW DOES NOT RAISE A SUBSTANTIAL QUESTION WARRANTING THIS COURT'S ATTENTION

The importance of this case lies in the assurance that the Federal Power Commission will be required, under the decision of the court below, to carry out its statutory responsibilities of protecting the public interest rather than abdicating those responsibilities by deferring to private contracts. And it would seem clear that the very fact that there is today a pervasive natural gas shortage should require more diligence on the part of the Commission to assure that existing captive consumers are not deprived of their present

supplies by predatory practices of others, rather than permitting the Commission to shrink from its responsibilities because it claims that an evaluation of the public interest is a "prodigious undertaking" in times of supply shortage.

Beyond this, the case neither establishes any new legal principles nor violates any already established. Because of the dearth of findings by the Commission on evidentiary matters and the failure to provide reasoned conclusions, there is really nothing for this Court to review. Natural does not claim that the Commission's decision is supported by substantial evidence and it could not because the Commission simply ignored the evidence that was produced. Natural's petition boils down to the proposition that the Commission may set any standard for abandonment it chooses in the name of a "policy" decision and the courts may not interfere, even if the standard is one of private contract rights as in this case, rather than the standard of "public convenience or necessity" provided in the governing statute.

Moreover, if the Court should take this case, it would be considering the decision of the court below in a vacuum. While Natural quibbles with the words "primary importance" as used by the court below in relation to the issue of relative needs (an undisputed public interest factor), we would similarly quibble with the words "significant weight" which the court below used in connection with contract rights. Until an adequate record has been made and the Commission has made sufficient findings of fact on all relevant issues and performed the balancing function which is required in evaluating the total public interest, there is simply

no framework within which to review this case further. The Commission itself, which has not sought review in this Court, apparently agrees.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 22, 1974

APPENDIX A

Set forth herein are pertinent portions of the Presiding Administrative Law Judge's findings and conclusions on the issue of comparative needs of Transco and its customers and Natural and its customers:

"The only areas where effective comparison can be made on the existing record are the existing reserves and reserve life indexes, the present and proposed curtailments, reordering of priorities and end use, and the impact upon the customers—particularly those that have participated in the proceeding. The Examiner rejects Transco's contention that the record, as it stands, requires a denial of the abandonment application without consideration of a comparison of both pipelines' needs and operations. However, on the basis of the evidence of record, as discussed below, the Examiner has concluded that Natural has failed to prove that the present or future public convenience or necessity permit abandonment. The abandonment applications must be denied.

First, while Transco's customers are experiencing an actual curtailment of gas, Natural's customers primarily are unable to add additional load within contract demand. Transco's customers take gas when permitted at almost a 100% load factor. In that Transco's customers recently have always taken all the gas they can get within their contracts, any curtailment results in a reduction of takes. This is true regardless of whether some of the gas sold in the summer as interruptible should have been used by Transco for a better balanced storage program and, if so used, would have reduced the percentage of curtailment in 1971-1972. Natural's customers, however, have not traditionally taken gas at 100% load factor on an annual basis; NI Gas and Peoples, for example, have experienced load factors of about 94% and about 90% respectively. Since both purchased gas at close to 100% during the winter, the summer load factors were much reduced. Increased load factor not only resulted from increased growth of summer boiler fuel sales, such as Commonwealth Edison's huge 1969-1971 additional purchases from Peoples, but also because at the same time as Natural expanded its storage fields a number of these companies embarked on expansion of their own

storage facilities so as to take the maximum gas under their own contract demand and sell it during the winter heating season. The impetus for this reordering of priorities is not altogether an altruistic desire to protect the residential consumer but because it is a profitable undertaking in that the per unit cost of gas decreases as the load factor increases, and per unit sales prices are higher in the winter for residential sales than in the summer for boiler fuel. While much of the stored gas would be used for winter heating uses of residential customers served by Natural or its distributors, the fact remains that the La Gloria gas will not replace gas previously bought and distributed by them. Thus, whereas Transco has a cut-back from levels of previous purchases by its customers, Natural's "cut-back" is essentially incremental in nature and is previously a limitation on growth. [1]

Nor does a comparison of the growth limitations disclose as serious a situation on Natural's system as on Transco's. While most of the companies involved are expanding sales and each has sold more gas in 1971 than in the preceding year, the rate of growth has varied. NI Gas for example has been growing at a rate of 8% to 9% annually and its projected deficiencies of 43,000 MMcf in 1971 and 50,000 MMcf in 1972 are essentially the amounts of gas required to continue growth at this level. While NI Gas's tariff permits attachments of new customers of up to 200 Mcf/d without a requirement of temperature control and Peoples' tariff permits a range of attachments on a priority favoring residential space heating, Brooklyn Union's tariff restricts any sales to customers exceeding 2 Mcf/hour (averaging 14-16 Mcf/d. Peoples has no limitation on attachments of additional loads for cooking, clothes drying, air conditioning or other residential non-space heating needs. Brooklyn Union under its tariff added 1,344 new customers and furnished 4,547 existing customer space heating gas, (1,200 MMcf annually of increased sales), but it has had no increase in the total number of customers in 10 years. NI Gas has, on the other hand, added 45,000 residential customers in 1971 and anticipated similar annual growth in the

[1] Through 1970 Natural's load factor did not exceed 85%, although in 1971 it exceeded 91%. Natural added substantial contract demand in December 1970.

future (a 1% growth factor for NI Gas represents between 4,000 and 5,000 MMcf annually of increased sales). Peoples added 81,000 equivalents in 1970 and estimated its growth at 33,000 equivalents for 1971. Thus, NI Gas alone has added eight times the number of residential customers than Brooklyn Union, and even if adjustment is made for the difference in territory served by the utilities, it was substantially more than Brooklyn Union. The conclusion is inescapable that Brooklyn Union is more severely limiting attachments of new customers than NI Gas and Peoples and is making substantially fewer attachments under its program than is either NI Gas or Peoples.

Neither Brooklyn Union, Peoples nor NI Gas, however, is in imminent danger of being unable to provide service to existing customers. Brooklyn Union's concern is the occurrence of that hypothetical winter following a design winter where its storage facilities would be low and could not be refilled from pipeline gas to meet customer needs. Brooklyn Union's design year is based upon the most severe winter of this century, and NI Gas on a design year which has occurred less than seven times in this century. NI Gas could not only meet a normal winter in 1972-1973, but the predicate for its estimates are a continued adding of 45,000 residential customers annually as well as commercial and industrial customers using less than 200 Mcf/d. While there is no question that their margins of safety are being reduced, and will continue to be reduced if they add substantial quantities of new load without purchasing new gas, they are not in imminent danger of running out of gas to serve their existing firm customers' needs. To the extent the dispute as to adverse effect is not based on present flowing gas deficiencies and curtailments but centers on long range projections, the situation will be affected by increased new sales during the intervening years and no finding of serious impairment of service to existing firm customers now can be made as to any of the companies involved." (J.A. 96-98).

• • • •

On the basis of all of the evidence of record, the Examiner concludes that Transco and its customers have a continuing need for the 81,000 Mcf/d of La Gloria gas not being sold them by the producers; that Transco's curtailment and possible effect on existing customers is more sub-

stantial than the effect of a decrease in purchases of primarily valley gas by Natural's customers; that Natural has failed to show that the adverse effect on it and its customers as compared to Transco and its customers permit abandonment by the producers of this sale to Transco; and that the applications seeking to abandon such sales must be denied." (J.A. 101).

SUPREME COURT, U. S.
FILED
APR 6
MICHAEL RODAK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1275

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner,

vs.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY BRIEF FOR PETITIONER, NATURAL GAS PIPELINE COMPANY OF AMERICA.

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Gunthorp-Warren Printing Company, Chicago • 346-1717

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

REPLY BRIEF FOR PETITIONER, NATURAL GAS PIPELINE COMPANY OF AMERICA.

Natural Gas Pipeline Company of America (Natural) submits this reply brief in further support of its writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case and in answer to the briefs in opposition of Transcontinental Gas Pipe Line Corporation (Transco), The Public Service Commission of the State of New York (NYPSC) and Associated Gas Distributors (AGD).

SUMMARY OF ARGUMENT.

Respondents' major arguments in support of the Court of Appeals are: (1) that the Commission, by honoring Natural's contract with the producers in the context of a Commission-approved settlement, improperly deferred to private rights rather than the public interest; and (2) that the remand was proper because the Commission totally ignored the comparative need factor. Both arguments are without merit.

Natural contracted for the supplies in question many years in advance. The settlement bargain by which Natural was to get the gas was approved by the Commission in a proceeding in which Transco intervened. That settlement also assured Transco that it would continue to receive its contract quantity unimpaired by allocation or other regulatory action. Transco, having long since received its contractual share of the gas—and two years more—now seeks to clothe itself in the robes of the public interest in order to take from Natural gas to which Natural is entitled *not simply under a private contract but also under a Commission-approved settlement.* To permit continuation of such a diversion and such intermeddling by one pipeline in the affairs of another cannot possibly be in the public interest, particularly when Natural will deliver the gas in the regulated interstate market to Midwest customers greatly in need of the gas.

The Court of Appeals substituted its judgment that comparative need is nearly absolute for the Commission's judgment that where need is not a decisive factor, the bargain struck in a Commission-approved settlement should be effectuated. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332, 344 (1956); *Texas Gas Transmission Corp.* v. *F. P. C.*, 441 F. 2d 1392, 1394 (6th Cir. 1971). The indecisive nature of the need factor is clearly revealed by an analysis of the Examiner's findings. In this context, the Commission's

decision, which emphasized the long-term effects on service stability and proper supply management rather than the transitory effects of a disposition based on an insignificant need differential, fully implemented the public interest.

ARGUMENT.

A. The Court Substituted Its Judgment for That of the Commission.

Respondents attempt to characterize the opinion of the Court of Appeals as a rather innocuous remand to the Commission to consider factors ignored in the proceedings below. AGD, for example, states that the Court determined the Commission "erred in focusing exclusively upon the contractual rights to the La Gloria Field gas supply" and further states that the Commission's decision was "completely devoid of any consideration of the need of Transco and its customers for the gas." (Br., p. 3). Transco suggests that the "whole thrust" of the Court of Appeals' opinion was to direct the Commission's attention to "any and all relevant public interest factors" and that the Court "made no attempt to tell the Commission how much weight" to accord the comparative need factor. (Br., p. 8). See also NYPSC Br., p. 2.

Despite Respondents' protests to the contrary, the Court of Appeals ruled that "primary importance" (Pet., p. A10) must be given to comparative need and refused to accept the Commission's evaluation of the public interest. This is not a case where the Commission ignored a public interest factor. Rather, it is a case where the Commission considered all aspects of the public interest and, in the context of a particular fact situation, found the policy of effectuating the settlement outweighed an indecisive "need" factor—only to have the Court of Appeals overturn that judgment. Therefore, the cases cited by Transco (Br., p. 9)—and much of the argument of Transco and AGD—is simply inapposite.

B. The Commission Adequately Considered Comparative Need.

Close reading of the Commission's Opinion No. 655 reveals that the factor of comparative need was not ignored. Rather, the Commission merely regarded it as indecisive under the particular circumstances.

As Transco (Br., p. 14) and AGD (Br., p. 8) point out, the Commission did not make a finding on which pipeline has greater need. In the view the Commission took of the case and a view Natural supports, both here and below (see Transco Br., p. 14), the Commission was not required to measure need on a finely calibrated scale.[1] There was a necessity to examine the record to determine whether the difference in need, if any, was sufficient to outweigh other factors being balanced in the scales of public convenience and necessity. The Commission did examine the record on need. (Pet., p. A26).[2] It observed two pipelines, both in great need of gas, and concluded that the need factor is not decisive (Pet., p. A27).

As observed by the Court of Appeals, recognition by the Commission that both pipelines need gas is not a finding of equal need. (App. A, p. A8). However, neither is it an indication that the Commission overlooked the factor of need. Failure to acknowledge this fact shows that the Court of Appeals was rendering the comparative need factor almost an absolute standard—a decision totally in conflict with the broad-based statutory public convenience and necessity standard—and was unwilling to accord the Commission the flexibility required in the balancing of all factors.

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1. The fact that the Examiner's findings were undisturbed (AGD Br., p. 2; NYPSC Br., p. 9; Transco Br., p. 5) is without significance, since the Commission disapproved the Examiner's entire approach to need.

2. Citations to Pet., p. A....., are to the Appendix to the Petition for Certiorari.

The Examiner's findings relied on so heavily by Transco (Br., p. 13) and AGD (Br., pp. 8-9) are relevant at this point—not to assess comparative need, the precise determination of which was not necessary to the Commission's decision—but to evaluate in a general way the sort of "need" background and context in which the Commission's Opinion No. 655 was promulgated. While Natural believes certain of these findings on Transco's greater curtailment were inaccurate and would have been expressly overturned had the Commission found it necessary to make a precise "need" determination, Natural also believes they reveal enough about comparative need fully to support the Commission's decision not to rely upon need as the decisive factor.

The Examiner's most important finding for purposes of the Commission's decision is that none of the distribution companies that presented evidence was in "imminent danger of being unable to provide service to existing customers" (App. B, p. B 7).[3] Therefore, the real question is not at all whether existing residential customers in New York will go short of gas rather than similar customers in Chicago. Rather, it is whether New York or Chicago will have additional gas for use in making interruptible sales, developing additional storage to protect winter heating loads, and serving additional customers.

With respect to this type of service, the Examiner's findings indicate the rapid growth in the residential market in the market area of Natural's customers, as Northern Illinois Gas Company alone added 45,000 residential customers in 1971 (App. B, p. B 1).[4] Another major customer, The Peoples Gas Light

3. For the convenience of the Court, certain of the Examiner's findings and discussion relevant to the need issue are excerpted as Appendix B hereto.

4. The Examiner drew the conclusion that Transco's customers are restricting service more severely. In fact, as the record makes clear, Transco's market area is quite static, whereas, Natural's is growing rapidly, particularly in the residential sector. Transco's distribution company customers are static in growth and have only a minor waiting list when compared to Natural's customers (App. B, pp. B1-B5).

and Coke Company, is faced with an extensive waiting list of residential customers. (App. B, p. B 3-B 4).

In addition, the Examiner emphasized stongly that it is Natural and its customers which are developing storage which enables them to limit interruptible sales (App. B, p. B 1-3) and that Transco has been quite remiss in this regard. (App. B, p. B 8-B 10).

In light of Natural's great need for gas to serve new residential customers, the greater ability and willingness of Natural and its customers to utilize gas to develop storage rather than to continue interruptible sales and the lack of any real threat to service to firm customers, it is hardly surprising[5] that the Examiner's other findings on Transco's curtailment did not appeal to the Commission as a sound basis for decision—even if the Commission had accepted them—when other important factors were present.[6]

C. The Commission, in Honoring the Settlement, Furthered the Public Interest.

Respondents intimate that, because the Commission relied upon a policy of effectuating a settlement comprised, *inter alia,* of a private contract, the Commission is somehow forsaking *public* interest in favor of a *mere private* interest. See Transco

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5. *F. C. C.* v. *Allentown Broadcasting Corp.*, 349 U. S. 358 (1955) is applicable in this situation. No party even attempted to undermine the basic administrative law holding of that case—that where comparative factors the Commission is required to consider are indecisive, the Commission may base its decision on other policy consideration rather than measuring the comparative factor precisely.

6. AGD also digs up the tired old red herring that the Commission improperly considered the certificate question prior to the abandonment question (Br., p. 5). Of course, the Commission considered certification first, as the only logical procedure to insure that gas would not be lost to the interstate market. But this determination in no way prejudiced the abandonment decision (Pet., p. A20).

Br., p. 16. However, the Commission expressly determined, prior to effectuating the settlement, that "(t)he bargain, when made, was in the public interest and it is no less so today." (Pet., p. A25.)

NYPSC relied (Br., p. 6) upon the following statement of the Court of Appeals:

> At bottom, the Commission's decision stands for the simple proposition that where all parties need contested gas supplies, the party having a contractual right to such gas will prevail. (App. A, p. A8)

There are at least two major fallacies in this statement and in the "private rights" argument of Respondents. First, the Commission in Opinion No. 655 was effectuating rights under a *Commission-approved settlement*[7]*—not simply* under a *private contract,* as Transco continually (and inacurately) represents (Br., pp. 11-12). Second, the Commission's expressions about need must be read in the context of the situation of the two pipelines (discussed in Section B above) and not in the abstract. The Commission clearly indicates in Opinion No. 655 that, when faced with convincing proof of significant differences in relative need, it would reach a different result. (Pet., pp. A26-A27).

The greatest shortcoming of the opinion of the Court of Appeals, as indicated in this quotation, however, is its failure to realize that the Commission's Opinion No. 655 was not a "simple proposition" at all and that public, as well as private, considerations were involved. The dispute over deliveries from the La Gloria Field has a long and complex procedural history,

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7. NYPSC also questions the interpretation of the settlement (Br., p. 4). However, the sense of the settlement has been interpreted by the Commission as including a recognition of Natural's right to receive the gas now being delivered to Transco. (Pet., p. A24). The Court of Appeals apparently acquiesced in this reading of the settlement when it acknowledged that the settlement should be accorded "significant weight." Transco, probably realizing this, "quibbled" with the Court's phrase (Br., p. 16). See NYPSC Br., p. 8.

a history in which Transco participated.[8] (Pet., pp. A22-A24). That history, culminated initially in the 1958 settlement. For many years, Natural accepted the detriments of this settlement. Now, when its benefits have come due, Natural's customers are to be deprived of those benefits by Transco, major beneficiary of the settlement to date.[9]

NYPSC speaks (Br., p. 8) of the Commission in Opinion No. 655 "giving paramouncy to private contracts over the public interest", and Transco also stresses this alleged dichotomy (Br., p. 16). Aside from the fact that once again the Commission's role in the initial settlement is ignored, this formulation also evades the fact that the Commission never purported to speak other than in the public interest (Pet., p. A25) and that *private arrangements and their recognition may serve the public interest,* especially when formulated under the Commission's watchful eye and with knowledge that the Commission must be satisfied.[10]

Even the enforcement of purely private contractual relationships has a public interest beyond the narrow private interests involved. This Court has made clear that such contracts are not lightly to be set aside. See *United Gas Pipe Line Co.* v.

8. The fact that Transco was not signatory to the settlement (composed *inter alia* of a contract amendment between Natural and the producers) is irrelevant (see NYPSC Br., p. 4), as Transco had an opportunity, as intervenor to the proceeding, to object to the settlement prior to its approval by the Commission.

9. It is ironic for Transco to speak of the "predatory" practices of others (Br., p. 16) when it has benefited from the 1958 settlement for some 15 years and now seeks to cut off the benefits to Natural and its customers, thus disrupting the settled expectations of pipelines and consumers. Absent the settlement, allocation of deliveries from the La Gloria Field might have been necessary, resulting in reduced deliveries to both Transco and Natural.

10. It is not true that the *Michigan Consolidated* case somehow shackled the Commission by establishing "the basic criteria for considering abandonment applications where the seller's aim is to shift service to a new purchaser." (NYPSC Br., p. 10.) The Court merely approved the Commission's application of a comparative need test in the particular circumstances of that case—circumstances which did not include a Commission-approved settlement. Indeed, the Court ultimately remanded, *inter alia,* for failure to give consideration to a proposal by certain of the parties of a settlement.

Mobile Gas Service Corp., 350 U. S. 332, 344 (1956) which sets forth very clearly that the "stability of supply arrangements . . . is essential to the health of the natural gas industry." Here, however, there was far more. The enforcement of this contract was in the context of a Commission-approved settlement which resolved a dispute over deliveries and was designed to insure stability in pipeline-producer relationships for the remainder of the La Gloria Field's productive history. See *Texas Gas Transmission Corp.* v. *F. P. C.*, 441 F. 2d 1392 (6th Cir. 1971) in which the Court stated of settlement agreements:

> Such agreements bind both parties—the Commission and the regulated entity—and thus allow both to avoid the delays and uncertainties of litigation. (441 F. 2d at 1394.)

It is the Respondents, rather than the Commission who are "mesmerized" (AGD Br., p. 3) by the narrow, short-term concept of the public interest to the exclusion of other factors. The La Gloria Field gas represents a prized supplement to the short-term gas supply of either pipeline in these times of shortage. However, it would be folly to ignore the long-term effects of the Commission's decision. Pipelines continue to be the unit for implementing service to the ultimate consumers. Planning and operation require that, once private contractual arrangements receive the Commission's initial blessing, these pipelines be able to rely upon a substantial degree of stability in such relationship.

Failure to honor settlements would be a significant source of disruption in the industry. Glib reliance on the public interest of the ultimate consumers on Transco's system should not be allowed to obscure the real-world, practical effects of this decision on the interest of all consumers—especially when the comparative need factor is as attenuated as it is in this context. Failure to encourage settlements and to encourage proper supply management and storage development will have far greater impact on even Transco's customers than the transitory effect of disposition of this gas. The Commission's decision was in the public interest in the broadest sense.

D. The Commission Is Not Bound to Implement an "Obligation of Continued Service."

NYPSC (Br., p. 9), AGD (Br., p. 5) and Transco (Br., p. 11) all rely upon the alleged obligation of continued service. However, the cases cited do not support a presumption favoring continued service but only recognize the statutory requirement to seek abandonment.

Sunray Mid-Continent Oil Co. v. *F. P. C.*, 364 U. S. 137 (1960) has very limited relevance to this case. There, this Court simply held that the Commission has power to issue an unlimited, as opposed to a limited, term certificate. The Court simply noted that the integrity of a private contract would not be impaired because of the obligation to continue service beyond its term unless the producer could prove abandonment; 364 U. S. 154-56. That case held nothing about the standards to govern under Section 7(b) nor did it involve a Commission-approved settlement.

Michigan Consolidated Gas Co. v. *F. P. C.*, 283 F. 2d 204, 214 (D. C. Cir.), *cert. den.* 364 U. S. 913 (1960), was an abandonment case. However, in the passage cited by NYPSC (Br., p. 9), the Court merely holds that the party seeking abandonment must present reasons for the abandonment, and cannot rely simply on its own whims. Adequate reasons for this abandonment were set forth in Opinion No. 655 and, hence, the requirements of that passage are satisfied. Furthermore, *Michigan Consolidated* was a case in which a *pipeline* rather than a *producer* sought abandonment and in which abandonment of service to the regulated market was sought in order to serve the unregulated market. In that situation, quite different weight would be accorded the notion of continuing service.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX B

is Commonwealth Edison, which used substantial quantities of gas for boiler fuel and turbine peaking at points outside Chicago. Sales to Commonwealth Edison by NI Gas for the eight month period ending August 1971 totalled about 23,100 MMcf including off-peak sales of about 17,000 MMcf (Ex. 14). No interruptible gas was sold to Commonwealth Edison by NI Gas in 1971. Approximately 190 customers seeking more than 200 Mcf/d were on a waiting list at the time of the hearing and represented demand for more than 30,000 MMcf annually. If it receives authority to terminate firm seasonal sales totalling about 37,000 MMcf annually to some 200 customers, it will provide new service only to firm, year-round customers after 1972—primarily residential, commercial and small industrial customers. It is attaching new residential customers at the rate of 45,000 units annually.

NI Gas has developed extensive underground storage which its witness indicated exceeds the storage capacity of most pipeline companies.[1] While its prior purchase load factor was estimated at between 93%-95%, it expects to take gas in the future at the highest load factor possible to fill this storage capacity. Summer takes by NI Gas in the future will not be sold as firm seasonal or interruptible sales but will be injected in storage, which storage will enable it to serve its present customers and the 45,000 new residential units annually it expects to attach. Firm customers, regardless of size, are not required

1. This storage program has permitted NI Gas, through a current daily storage withdrawal capacity in excess of 1,300 MMcf/d, to provide up to 32% of its needs on a peak day; 15.9% of NI Gas' 1970-1971 winter capacity on peak days was from its own storage.

to have alternate facilities for burning other fuel. Assuming (1) continued attachment of 45,000 residential units annually, (2) restriction against attaching customers with use of over 200 Mcf/d, and (3) no tariff relief for firm and peak sales, it would have difficulty meeting all needs during severe weather conditions after the 1971-1972 winter season. Under an arrangement with Natural it permanently relinquished 50,000 Mcf/d of winter service gas in exchange for additional summertime takes which it could use for its own storage facilities. This will result in a more effective use of its storage. It projects that a substantial amount of its 10,000 MMcf share of La Gloria gas would be used for storage.

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NI Gas's long-range concern is this lack of safety margin for the severe winter season—i.e. occurring six or seven times a century—commencing possibly in 1972-1973. If a severe winter should occur in 1972-1973 it would not have sufficient gas reserves for the following year. It principal present problem therefore, is its inability to purchase gas from its suppliers to fill its storage facilities to provide a safety margin or to purchase increased supplies, particularly within existing contract demand, to meet what it considers is its reasonable growth needs.

Peoples Gas Light and Coke Company,[1] the parent of Natural and its second largest customer, serves the city of Chicago. Its share of the La Gloria gas is about 8,270 MMcf annually. Peoples has been unable to obtain a sufficient supply of gas from its subsidiary to meet its total requests for additional service and has restricted new attachments pursuant to a plan filed with the Illinois Commerce Commission and approved by that Commission on December 16, 1970 (Ex. 11). Paragraph 9 of Exhibit 11 shows that during the past eight years Peoples,

1. Testimony of Peoples' operations and requirements was supplied by Natural's witness in that Peoples presented no witness of its own.

which represents its firm year round space heaing growth in terms of equivalents (each "equivalent" equals gas used for space heating of a single family dwelling grew as follows (p. 9):

Year Ending September 30	Heating Load Added in "Equivalents"
1963	52,110
1964	49,434
1965	53,805
1966	53,807
1967	57,288
1968	57,556
1969	65,748
1970	82,000 (Est.)

It estimated its 1971 attachments as 33,000 equivalents. As of September 1971 its waiting list totalled about 291,000 equivalents, broken down into about 14,000 residential applications (138,000 equivalents), 2,000 commercial (116,000 equivalents) and 800 industrial (37,000 equivalents).[1] Under a tariff effective May 4, 1970, Peoples required prospective customers to apply 12 months in advance, with the right of Peoples' to delay complying with the application depending on availability of gas. Under its tariff provision to be effective as of September 1, 1972, restrictions will be placed on year-round firm and off-peak service. Allocation of additional service will first go to central space heating, whether for residences or industries, industrial processing, fume abatement and other applications where gas is the only practicable form of energy; and then all other users. Within these categories size is the determinative factor (Ex. 13). No limitations were placed on the attachment of addi-

1. According to Natural's brief, despite releases of over 8,000 applicants (those attached plus those that allegedly tired of waiting) Peoples' October 26, 1971, waiting list included almost 9,000 residential applications with 134,000 equivalents. For the nine-month period ending September 28, 1971, it had 8,089 releases from its waiting list.

tional load for cooking, clothes drying, air conditioning and non-space heating. Sales to Commonwealth Edison for boiler fuel were about 41,000 MMcf in 1970, and Commonwealth Edison will continue to receive service under a temperature control service which reduces service only when gas is needed on cold days to supply other customers. Commonwealth Edison's sales represented a substantial increase from previous years' sales and were largely off-peak summer gas volumes. Other industrial customers are also controlled by temperature control service (Ex. 12).

Air pollution standards in the City of Chicago are controlled by the Chicago Municipal Code as amended in 1970 which limits particulate and sulphur emissions. (Ex. 4) Reduction in the sulphur content of fuel burned for space heating, industrial use, and electric generation in the 1970 regulations require, *inter alia*, that no more than 1% sulphur fuel can be used for any purpose for new or existing facilities after September 1,

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Brooklyn Union's main difficulty is literally running out of supplies in a design winter equalling 1933-1934—one of the worst of the century. Although it has sufficient reserves during a design winter for several days peak service, when its peaking supplies are depleted it would be unable to refill them from pipeline supplies. Transco has curtailed it 12% during September 1971 and has projected 3% to 4% winter curtailment through April 1972. Another of its suppliers has curtailed one of its winter storage service by 3%, but this represents a small decrease compared to Transco's. Brooklyn Union has prohibited any additional sales exceeding 2 Mcf/hour to firm customers (which averages between 14 and 16 Mcf/d) and has not accepted any application for industrial customers since some time in 1970. Service has been refused over 300 customers requesting service in excess of 2 Mcf/hour and 197 industrial customers.

It is still attaching some customers under its temperature control service where applications were pending and construction had commenced when it stopped accepting applications. Its temperature control service requires customers to shift to alternate fuels on colder days so as to make more gas available for other residential units (primarily single families) not in a position to use other fuels. During the first nine months of 1971 it added 1,344 new customers and furnished 4,547 existing customer's space heating gas (about 1,200 MMcf annually) (Ex. 16). According to the witness, however, Brooklyn Union is not growing and has the same number of customers today as it did 10 years ago. Interruptible sales totalling 10,000 MMcf for 1971 to the date of the hearing were made by it, about 1,000 MMcf being sold in September 1971 at about the same time that Transco was imposing mandatory curtailment to fill storage. Brooklyn Union's position is that it takes what gas is offered because if it does not the gas will be "burned under the boiler some place else." Transco could not inject the gas into storage, and had no additional storage space available, so Brooklyn Union bought the gas and made interruptible sales which generate revenue from facilities that are costed at a fixed level. Such sales lower the overall average cost for each unit sold within contract demand. Sales of interruptible gas by a company like Brooklyn Union at a time when Transco is curtailing sales, therefore, occur when firm customer's desires are met and Transco's limited storage facilities are unable to

fuel. While much of the stored gas would be used for winter heating uses of residential customers served by Natural or its distributors, the fact remains that the La Gloria gas will not replace gas previously bought and distributed by them. Thus, whereas Transco has a cut-back from levels of previous purchases

by its customers, Natural's "cut-back" is essentially incremental in nature and is previously a limitation on growth.[1]

Nor does a comparison of the growth limitations disclose as serious a situation on Natural's system as on Transco's. While most of the companies involved are expanding sales and each has sold more gas in 1971 than in the preceding year, the rate of growth has varied. NI Gas for example has been growing at a rate of 8% to 9% annually and its projected deficiencies of 43,000 MMcf in 1971 and 50,000 MMcf in 1972 are essentially the amounts of gas required to continue growth at this level. While NI Gas's tariff permits attachments of new customers of up to 200 Mcf/d without a requirement of temperature control and Peoples' tariff permits a range of attachments on a priority favoring residential space heating, Brooklyn Union's tariff restricts any sales to customers exceeding 2 Mcf/hour (averaging 14-16 Mcf/d). Peoples has no limitation on attachments of additional loads for cooking, clothes drying, air conditioning or other residential non-space heating needs. Brooklyn Union under its tariff added 1,344 new customers and furnished 4,547 existing customer space heating gas (1,200 MMcf annually of increased sales), but it has had no increase in the total number of customers in 10 years. NI Gas has, on the other hand, added 54,000 residential customers in 1971 and anticipated similar annual growth in the future (a 1% growth factor for NI Gas represents between 4,000 and 5,000 MMcf annually of increased sales). Peoples added 81,000 equivalents in 1970 and estimated its growth at 33,000 equivalents for 1971. Thus, NI Gas alone has added eight times the number of residential customers than Brooklyn Union, and even if adjustment is made for the difference in territory served by the utilities, it was substantially more than Brooklyn Union. The conclusion is inescapable that Brooklyn Union is more severely limiting attach-

1. Through 1970 Natural's load factor did not exceed 85%, although in 1971 it exceeded 91%. Natural added substantial contract demand in December 1970.

ments of new customers than NI Gas and Peoples and is making substantially fewer attachments under its program than is either NI Gas or Peoples.

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Neither Brooklyn Union, Peoples nor NI Gas, however, is in imminent danger of being unable to provide service to existing customers. Brooklyn Union's concern is the occurrence of that hypothetical winter following a design winter where its storage facilities would be low and could not be refilled from pipeline gas to meet customer needs. Brooklyn Union's design year is based upon the most severe winter of this century, and NI Gas on a design year which has occurred less than seven times in this century. NI Gas could not only meet a normal winter in 1972-1973, but the predicate for its estimates are a continued adding of 45,000 residential customers annually as well as commercial and industrial customers using less than 200 Mcf/d. While there is no question that their margins of safety are being reduced, and will continue to be reduced if they add substantial quantities of new load without purchasing new gas, they are not in imminent danger of running out of gas to serve their existing firm customers' needs. To the extent the dispute as to adverse effect is not based on present flowing gas deficiencies and curtailments but centers on long range projections, the situation will be affected by increased new sales during the intervening years and no finding of serious impairment of service to existing firm customers now can be made as to any of the companies involved.

Evidence was adduced by both the City of Chicago and Consolidated Edison showing the effects on the environment of limiting gas sales in Chicago and New York respectively. Both now have, or shortly can be expected to have, relatively similar pollution abatement laws under the existing Federal Standards and both would obviously benefit by burning gas rather than other fuels with higher sulphur content. Since electric utilities

in and around these cities contribute by far the largest amount of pollutants—estimated in New York's

the reluctant desire of the parties to this case to make a complete record and the obvious lack of adequate evidence as to how priorities of use should be reordered, it is patent that this is not the proper proceeding in which to determine the relative merits of phasing out any particular service or singling out any particular company for separate treatment. As a matter of policy, however, it is in the public interest that any present plans of these pipelines to limit both interruptible, seasonal and firm boiler fuel use on their systems should be encouraged.

The cost to Transco if it should lose La Gloria gas and if it were not replaced would be about $7,000,000. If the gas were replaced by other gas, even substantially higher cost gas, the loss would be less. The dollar savings to Natural if it obtained the gas and it did not have to add facilities, would be about the same as the loss to Transco. On a comparative basis the Examiner concludes that both companies would benefit to the same degree or suffer to the same degree financially depending upon which company receives the 81,000 Mcf/d of La Gloria gas. Both, ultimately, would recover increased costs from their customers.

One of the unspoken reasons that possession of 81,000 Mcf/d of La Gloria gas has been so vigorously contested appears to be its relatively cheap cost.[1] La Gloria gas by today's standards is cheap gas—particularly when compared, for example, to emergency purchases at 35¢/Mcf now being made by Transco in the *Nueces* case. These basic financial considerations point up one of the equitable difficulties in the instant case. Whether belatedly or not, Natural's management in the immediate past has taken those steps necessary to increase storage, has managed its storage

1. Both Natural and Transco argue that this amount of gas is not of great importance to the other; it represents, as Staff points out with regard to Transco, only a small percentage of Transco's reserves. The same argument, of course, is pertinent to Natural.

facilities so as to keep them in a reasonable balance, and has made substantial efforts to reorder its priorities to protect its winter residential needs. Transco on the other hand, appears to have grossly miscalculated its flowing gas deficiency and sold gas in the spring and early summer months of 1971 which it should

have injected into storage even, perhaps especially, to the extent that this required the development of new storage fields. Transco also had no plans at the time of the hearing to add storage so as to reduce its customers' sales of interruptible gas during 1972 and 1973. Nor can one ignore the fact that it was the refusal of South Texas to deliver approximately 100,000 Mcf/d of gas under its contract which aggravated Transco's flowing gas problem. An investigation of the arrangements between South Texas, Nueces, and Transco is the subject of another Commission proceeding and were not pressed in the instant case, but the Examiner notes that while Transco has been seeking certificates for emergency purchases from Nueces it is mainly Transco's customers which oppose the South Texas abandonment application. When all is said and done, it is unfortunate that the customers of the pipeline which has shown less ability to cope with the consequences of a gas shortage should benefit monetarily from availability of cheaper gas while the customers of the pipeline which has shown greater foresight are denied such benefits. The Examiner concludes however, that despite this seeming inequity, the Natural Gas Act was designed to protect the ultimate consumer receiving the gas service—which in this case is Transco's customers, and this includes protection against the errors of the transmission company. Compare *United Gas Pipe Line Co.*, 3 FPC 3 (1942), where the distributor and pipeline erred in projecting the completion date for alternative facilities and could not reach agreement on an extension of service. An abandonment of service which would have affected the customers was not permitted during the interim period of time. See also the Commis-

sion's October 22, 1971, order in the *Nueces* case *supra*. In these circumstances, the Examiner believes that the equitable considerations favoring Natural are not of a nature to override the adverse effect to Transco's customers of the loss of the La Gloria Gas.

On the basis of all of the evidence of record, the Examiner concludes that Transco and its customers have a continuing need for the 81,000 Mcf/d of La Gloria gas not being sold them by the producers; that Transco's curtailment and possible effect on existing customers is more substantial than the effect of a decrease in purchases of primarily valley gas by Natural's customers; that Natural has failed to show that the adverse effect on it and its customers as compared to Transco and its customers permit abandonment by the producers of this sale to Transco; and that the applications seeking to abandon such sales must be denied.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1275

NATURAL GAS PIPELINE COMPANY OF AMERICA,
PETITIONER

v.

TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION

The court of appeals set aside an order of the Federal Power Commission authorizing a group of natural gas producers to abandon their sales of gas to Transcontinental Gas Pipe Line Corporation (Transco), pursuant to Section 7(b) of the Natural Gas Act, 15 U.S.C. 717f(b), and issuing certificates of public convenience and necessity, under Section 7

(c) of the Act, 15 U.S.C. 717f(c), for the sale of the same volume of gas to petitioner (Natural). The court held that the Commission failed to consider all the factors relevant to the question of abandonment.

1. In the late 1940's, the operators of the La Gloria Field, a newly-developed natural gas production area in southern Texas, negotiated contracts with Transco and Natural. The contracts specified that a certain quantity of gas would be sold to each pipeline over a 20-year period. After a few years of operation, it became evident that the full production of the La Gloria Field was insufficient to provide the quantities specified in both contracts. The producers began to reduce their deliveries to Natural and attempted to terminate their contracts with Natural.

Natural filed complaints with the Commission. Transco, alleging that the disposition of Natural's complaints would affect its right to receive the volumes of gas specified in its own contracts with the producers, petitioned to intervene. The Commission permitted Transco to intervene and, after a hearing, ruled that the producers must continue to deliver the gas called for by their contracts with Natural.

While petitions for review were pending in the court of appeals, the parties agreed upon a compromise settlement, which took the form of an amendment to Natural's contract with the producers. Natural agreed to an immediate reduction in the volume of gas called for in its contract, and the producers agreed in return to dedicate all their reserves in the La Gloria Field to Natural, subject

only to existing contractual commitments to other pipelines such as Transco. Transco's contract was unaffected; it was to continue to receive the full volume of gas called for by the contract until its expiration in 1971. Transco did not object to the settlement agreement. The Commission approved the settlement in 1958, finding that it was "necessary and appropriate in the public interest, and in the administration of the Natural Gas Act" (20 FPC 208, 210).

2. In accordance with the settlement, the La Gloria producers sought permission to discontinue their sales of gas to Transco upon expiration of its contract in 1971 and to commence sales of the gas to Natural. After a hearing and an initial decision by a hearing examiner, the Commission authorized the abandonment of sales to Transco and certificated the sales to Natural.

The Commission found "the fair import of the settlement to be that Transco was to continue to get its 81,000 Mcf/day until its contract expired in 1971, and abandonment of the producer-Transco sale was permitted, and Natural was to get all gas the field could produce, other than that sold to Transco and others under then existing contracts" (Pet. App. A24). Transco benefited from the arrangement, because it was "able to take its full contract quantity for the life of its contract, even though Natural's quantity was cut for that period" (*id.* at A25).

The Commission concluded that "the public convenience and necessity permits abandonment" (*ibid.*);

a contrary conclusion would disregard a "settlement which we approved as being in the public interest" (*ibid.*). Because "the pipeline industry [must] be able to plan and execute long-range gas supply acquisition programs" (*id.* at A26), an order abrogating a Commission-approved settlement would "ultimately redound to the detriment of the industry we regulate and the customers it serves" by adding to the existing uncertainty of contract rights within the regulatory structure and by disrupting "the orderly functioning of the interstate pipeline industry" (*id.* at A27).

The Commission accordingly determined that, in order to encourage pipelines "to manage their independent gas supply acquisition programs with as little external interference as the public convenience and necessity permit" (*ibid.*), it would not abrogate an approved settlement agreement except upon "a showing of unequivocal public necessity" (*ibid.*). It concluded that no such showing had been made in this case. "[B]oth pipelines are in short supply of natural gas and each is rendering less than full service to its customers. The loss of this gas to either pipeline will result in a diminution of its ability to continue even current levels of service" (*ibid.*).

3. The court of appeals held that, while a Commission-approved settlement agreement "must be accorded significant weight in the determination of the overall public interest" (*id.* at A10), "[p]rimary importance must be given to a broadly conceived comparison of the two natural gas systems and the public

markets they serve" (*id.* at A10-A11). It accordingly set aside the Commission's order and remanded the case for a redetermination of the abandonment issue based upon the court's view of the relevant public interest considerations.[1]

4. In view of the interlocutory nature of the court of appeals' order, which leaves open the possibility that the Commission may reach the same conclusion on the question of abandonment even under the court's standards,[2] the Solicitor General determined not to file a petition for a writ of certiorari at this stage of the proceeding. Although that determination does not mean that we oppose the granting of Natural's petition for a writ of certiorari or that the Commission accepts the court of appeals' view of the applicable legal standards, it does reflect the Commission's judgment that, in the present posture of the case, the decision of the court of appeals does not seriously interfere with the Commission's per-

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[1] Thereafter, on February 22, 1974, the Commission issued an interim order determining "the allocation of gas between the two pipeline companies during the interim period during which further proceedings are to occur," and deferring until further order of the Commission consideration of certain motions by Transco and Natural.

[2] Further inquiry might show, for example, that Transco's "need" for some of the gas is slightly greater than Natural's but that the difference, even if given "primary importance," does not outweigh the substantial long-range public interest in honoring the terms of the approved settlement agreement.

formance of its regulatory responsibilities under the Natural Gas Act.

Respectfully submitted.

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MAY 1974.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1974 539039 348

Supreme Court, U. S.
FILED
MAY 17 1974
MICHAEL RODAK, JR., CLERK

IN THE

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NATURAL GAS PIPELINE COMPANY OF AMERICA,
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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY OF PETITIONER, NATURAL GAS PIPELINE COMPANY OF AMERICA, TO MEMORANDUM OF FEDERAL POWER COMMISSION

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Gunthorp-Warren Printing Company, Chicago • 346-1717

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REPLY OF PETITIONER, NATURAL GAS PIPELINE COMPANY OF AMERICA, TO MEMORANDUM OF FEDERAL POWER COMMISSION

Natural Gas Pipeline Company of America (Natural), Petitioner herein, submits this further reply brief in support of its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the case and in response to the "Memorandum for the Federal Power Commission" (Memorandum) received May 9, 1974. Natural previously filed a reply brief April 4, 1974 in answer to the briefs in opposition of respondents.

1. The Federal Power Commission (Commission) does not oppose the granting of Natural's petition for a writ of certiorari

or accept the Court of Appeals' "view of the applicable legal standards. . . ." (Memorandum, p. 5.) Nevertheless, the Solicitor General determined not to file a petition because of a judgment that "in the present posture of the case", which is remanded for further proceedings, the decision of the Court of Appeals "does not seriously interfere with the Commission's performance of its regulatory responsibilities under the Natural Gas Act." (Memorandum, pp. 5-6.) The Memorandum also referred to the "interlocutory nature" of the Court of Appeals' Order. (Memorandum, p. 5.)

2. Natural sympathizes with the Commission's desire to conform to the Court of Appeals' Order and to attempt to dispose of the remanded proceeding in accordance with the Court of Appeals' decision. However, Natural believes the Commission has been unduly optimistic about the purport of that decision for the remanded proceeding and has overlooked the restraints it imposes on the proper exercise of the Commission's duties under the Natural Gas Act.

3. As Natural has demonstrated in its petition for certiorari and its reply brief, the Court of Appeals' decision prevents the Commission from according the various factors present here their proper weight, despite the fact that balancing of factors is a task delegated to the Commission and not the courts. Absent review by this Court, the interpretation of Section 7(b) of the Natural Gas Act by the Court of Appeals is final and, despite the "interlocutory nature" of the remanded proceeding, will be binding upon the Commission's further deliberations in this proceeding and will have an effect as precedent for other Commission proceedings. By prescribing not only the factors to be considered by the Commission but also the weight to be assigned such factors, the Court of Appeals has imposed upon the Commission a fixed pattern of decision which precludes the Commission from properly discharging its statutory duties under Section 7(b) of the Natural Gas Act.

4. The La Gloria Field is currently unable to deliver gas sufficient to supply both the quantities certificated and contracted to Natural not at issue in this proceeding and the 81,000 Mcf of gas per day to Transcontinental Gas Pipe Line Corporation (Transco), which is the subject of this abandonment and certificate proceeding. Deliverability from the La Gloria Field continues to decline. In light of these facts and the general nationwide gas shortage which affects both Natural and Transco, Natural has no assurance that, even if its legal rights to the La Gloria Field gas are eventually vindicated by the Commission, any remedy will be available by the time such a determination is reached in the remanded proceeding.

Therefore, the "interlocutory nature" of the proceeding is no justification for deferring review of the Court of Appeals' decision. This Court has recognized that relief under the Natural Gas Act should not be deferred pending further proceedings if such a deferral can be avoided, but should be awarded at the earliest possible moment; *F. P. C.* v. *Tennessee Gas Transmission Co.*, 371 U. S. 145 (1962); *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U. S. 223 (1965). See also *Public Service Commission of the State of New York, et al.* v. *F. P. C.*, Nos. 24716, *et al.* (D. C. Cir., March 25, 1974); Mimeo at pp. 101-106. A departure from this principle here might render review meaningless when finally obtained.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 15, 1974.